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THE FREEDOM OF INFORMATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
TECHNOLOGY AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

THE FREEDOM OF INFORMATION ACT

AUGUST 2, 1988

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THE FREEDOM OF INFORMATION ACT

TUESDAY, AUGUST 2, 1988

U.S. SENATE,
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:42 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick Leahy (chairman of the subcommittee) presiding.

Also present: Senator Hatch (ex officio).

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Good morning and welcome, and I apologize for the 10-minute delay. We will add 10 minutes on to the other end of the hearing. We have a day where it seems that everything is going on. We have been trying to set up a conference on drought legislation which, for those of you who cover FOIA, may not carry quite the same significance, but it does have a tad bit of impetus in the Congress. We are trying to resolve that issue, hopefully, by at least late Saturday night.

The hearing this morning, I believe, is a very, very important one. We come together at a significant time in the history of the Freedom of Information Act.

I feel, and I am sure the first witness will probably disagree with me, but I feel that for the past 8 years the administration has waged an assault on the FOIA with every single weapon in its arsenal—executive orders, budget cuts, fee guidelines, and legislative proposals clearly designed to gut the FOIA.

FOIA requestors have been treated as burdens, nuisances, not as the beneficiaries of a statute whose fundamental premise is that American citizens have the right to know about the activities of their government; that their government is really responsive to them and responsible to them, and not the other way around. If you are going to have responsible government, you ought to be able to know what is going on.

Now, I have watched what has happened with the administration trying to cut back the FOIA, and I am reminded of what happened 6 or 7 years ago with the EPA when the Director of EPA, while giving lipservice to the laws, did everything possible to gut the Environmental Protection Agency.

She reorganized the enforcement division of the agency about every 2 weeks. Now, that made it absolutely impossible for anybody to enforce EPA statutes, and we turned the slogan around. Instead

of saying, "Give a hoot, don't pollute," it was more like, "Go ahead and pollute, we do not give a hoot," for whatever that is worth. And I am afraid that the same thing may be happening with the FOIA.

The administration has many complaints about the Freedom of Information Act. They say it is too time consuming to respond to requests for information, that it costs too much money to photocopy government records, and that public disclosure of agencies' activities only makes running the Federal Government more difficult. It is hard to run the government if the people know what you are doing.

Well, these are excuses for government secrecy, and they could be an impenetrable shield to hide failed policies, to hide the waste of public resources and the mismanagement of government operations, or even to hide the corruption of public officials, were it not for our continued effort to safeguard the Freedom of Information Act.

FOIA was established specifically to deter secrecy in government. It creates a statutory right to request records held by Federal agencies. FOIA makes available to each American citizen information to deal with the complexity of government, even to understand its actions and purposes.

During its 20-year history, the Freedom of Information Act has led to the disclosure of much government waste and wrongdoing. It has expanded public knowledge of health, safety, and environmental risks. It has been the key to public knowledge of Federal contract discrimination, Medicare fraud, dangerous consumer products, harmful drugs, and unsafe medical devices.

In just the past year, FOIA requests have revealed that the FBI maintained files on distinguished American writers whose work was considered suspicious in a country that has the strongest first amendment rights of anywhere in the world; that tobacco companies were privately aware of the risks of cigarette smoking while publicly denying them; that safety problems at NASA were directly linked to poor management; and even that funding for the Contras went to buy volleyball nets and color TV sets.

Now, in America we are the beneficiaries of a law that allows all of us to oversee the activities of our government, to pierce the cloak of secrecy, and to obtain the information we need to correct any government abuse. We, the Congress, the press, the public, we all share in that responsibility.

So I think this hearing will help us to find out just how well the administration is upholding the Freedom of Information Act. Again, just so everyone from the administration and elsewhere will understand how I feel about FOIA, the FOIA is designed to make government responsive to the people, not the other way around.

FOIA is there to make sure that the government does not hide mistakes, does not hide errors, and does not hide wrongdoing. Actually, if they are unable to hide it, if it becomes known, that is not an indictment of government. If anything, it is a strengthening of government.

Only in a democracy can we learn from those mistakes and can we learn from the fact that we do not hide them. I have never known this country not to be ultimately strengthened if we found

out about government misjudgments or inaction or wrong actions. We have usually been strengthened by the steps taken to correct it from happening.

So, Mr. Markman, I am glad to have you here. I know you have looked forward to this with great eagerness, and it is all yours.

STATEMENT OF STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. MARKMAN. Thank you very much, Senator. I hope that it will suggest no disrespect when I say that I find it difficult to agree fully with your opening statement assessing our performance on FOIA.

Senator LEAHY. If you did agree fully with it, I would figure that I had overlooked something. [Laughter.]

Mr. MARKMAN. Mr. Chairman, I am pleased to be here this morning to address the Department of Justice's administration of the Freedom of Information Act, the principal statute governing public access to Federal information from the executive branch. Over the past 20 years, this act has become an essential part of our open and democratic system of government.

I would ask your consent to put my entire statement in the record.

Senator LEAHY. Without objection.

Mr. MARKMAN. As you know, the Justice Department exercises governmentwide responsibility to encourage agency compliance with the act, seeking always, in the words of the Supreme Court and this committee, to ensure the fullest responsible disclosure of government information.

Although it is certainly not without controversy, we are extremely proud of that record during the past 7 years of this administration. Our FOIA counselor service has responded to thousands of requests for guidance from other executive branch agencies. Our ombudsman activities have arbitrated requestor-agency disputes. Our FOIA updates have helped to develop a consistent and responsible public policy. Our Annual Guide to FOIA has served as the single indispensable reference to the FOIA realm.

Our conferences and seminars have provided high-quality education in FOIA policy and procedure to a generation of government officials, and our guidelines in such areas as fee waiver policy and law enforcement records have provided balanced direction in the administration of the Freedom of Information Act.

At the same time, within the Department itself, in 1987, for example, more than 60,000 FOIA requests were processed and more than 2,000 administrative appeals handled, requiring the dedication of over 600 employee years.

Not only are the number of requests and appeals growing, but so is the complexity and magnitude of such cases. Last year, the FBI alone released nearly 800,000 pages under the FOIA and currently has before it 149 project requests, each involving over 3,000 pages, encompassing a total of over 900,000 pages.

Mr. Chairman, where differences emerge between the Department and its critics on the administration of FOIA, they generally

relate to the different premises that we bring to the process. They are honest differences, but differences nevertheless.

They are not differences that relate to the value of FOIA, but rather to the understanding of the public interest to be served by the act. In our judgment, there are a variety of public interests that must be borne in mind in administering FOIA.

The perpetual task of the legislative and executive branches is to bring these various public interests into a reasonable equilibrium. While the most obvious public interest under FOIA—and, incidentally, that one with the most visible constituency—is the public interest in the disclosure of government information, this is not the only public interest that must come into play.

In addition, there are the equally legitimate public interests in, first, ensuring that congressional policy is enforced in not disclosing certain categories of information that are the subject of the nine FOIA exemptions.

Second, there is the public interest in seeing that scarce taxpayer resources are used in a fiscally responsible and productive manner. Third, there is the public interest in seeing that the necessary demands of FOIA are carried out in a way that intrudes as little as possible upon the principal public mission defined for each government agency.

And, fourth, there is a public interest in seeing that the stated objectives of FOIA are maintained as paramount ones, to improve the ability of citizens to oversee the operations of their government, not to satisfy more parochial and narrow private interests at taxpayers' expense.

In this latter regard, I point to the remarkable transformation of FOIA that has occurred over the past 20 years. Today, a typical FOIA scenario is not, as originally envisioned by the Congress, the journalist who seeks information about the development of public policy which he intends to publish for the edification of the public. Rather, it is the corporate lawyer seeking business secrets of a client's competitors, the felon attempting to learn who informed against him, the bored inmate, the drug trafficker trying to evade the law, the foreign requestor seeking a subsidized benefit that our citizens cannot obtain from his country, and the private litigant who, constrained by discovery rules, turns to FOIA to give him what a trial court will not.

The world of the Freedom of Information Act in 1988, Mr. Chairman, would be unrecognizable to its architects in 1966 and 1974. The good name of FOIA, well earned over the past 20 years, should not be allowed to camouflage the growing number of not-so-good uses of the act.

Senator LEAHY. But, Mr. Markman, isn't that assessment somewhat in the eye of the beholder? You know, if we heard exactly the same kinds of concerns from everybody that we do from the Department of Justice, then I would share more of your concern, but I don't hear that.

I hear from other agencies which would have just as many complex reasons to be opposed to FOIA if they felt there was abuse, yet they don't oppose it that way. Let me give you an example. According to the 1987 annual FOIA report for the Justice Department,

you processed 60,000 requests at an estimated cost of $18 million, is that correct?

Mr. MARKMAN. Yes, sir.

Senator LEAHY. Now, that comes out to about $300 for each FOIA request of those 60,000. The Department of Health and Human Services had 121,000 requests during the same period, a little more than double. Their cost was $8 million, which comes out to about $65 per request, instead of the $300 it costs you.

Why is this? You know, I look at these results as sort of a model of answering FOIA requests. You spend five times as much to process a FOIA request at Justice as they do at HHS. They don't seem to have the concerns you do.

Is there any corollary to this? Why does it cost you so much more?

Mr. MARKMAN. Well, Senator, I agree that the eye of the beholder is important here. It is very easy for individuals to look upon their own private interest as somehow identified with the public interest.

It is up, of course, to legislators and members of this branch ultimately to negotiate and arbitrate and determine what, in their judgment, genuinely reflects the public interest.

Certainly, it is true that the average request costs more to process by the Justice Department than it does by HHS, although I note there are other agencies that expend additional resources than the—more resources than the Justice Department does to process requests.

There are 101 factors that come into play here. We have a great deal of classified information that is the subject of FOIA requests; HHS doesn't. We have many more complex project requests, as I indicated in my opening statement, that HHS doesn't.

Many of the requests there go through FDA and they are very routine requests that can be processed much more expeditiously, much more routinely, than the kinds of requests going through the Justice Department, which often implicate issues of law enforcement and public safety and the protection of informants and a variety of sensitive issues.

Senator LEAHY. But HHS also has a great deal of confidential matters that must be touched by this. In the Food and Drug Administration, you are going to find everything from confidential business records on through that have to be checked out to make sure the exemptions under FOIA apply.

You have got the Social Security Administration—a lot of those records have confidential aspects like health care financing, a number of medical records that are in there, plus business records.

Can we really say, on balance, that it is five times more difficult and five times more complex to process a request at Justice than it is at HHS?

Mr. MARKMAN. I think one can——

Senator LEAHY. Taking out some of the types of requests that are made of the two departments, I find it hard to think that it is five times more complex at the Justice Department. I mean, not every request that you get down there involves the intricacies of organized crime or some major criminal matter, does it?

Mr. MARKMAN. No, not every one is, but a great many are, and certainly when you have those requests that involve classified information and requests that implicate the identify of informants and issues of that sort, they sometimes skew the statistics very substantially.

There are many other factors, too. There is the clarity of exemptions. Certainly, the exemption that protects some medical records, one that is often invoked by HHS, is a fairly clear exemption, one that they would be invoking without the same kind of difficulty that we might have in invoking some of our exemptions.

Again, I point out the fact that the average time that it takes for the Justice Department to process a request is less than it is on the part of other agencies that——

Senator LEAHY. Such as?

Mr. MARKMAN. Such as the State Department, such as CIA.

Senator LEAHY. Well, they are going to have a chance—I can see the State Department witness eagerly awaiting his opportunity to talk about this.

Mr. MARKMAN. Well, let me just emphasize my——

Senator LEAHY. He and I discussed it over the weekend and I know he agrees.

Mr. MARKMAN. My comparison is not to suggest they are not doing as good a job as we are. It is simply to suggest that the nature of requests that they have to deal with on a routine matter is of a much more complex and sensitive sort than is even the Justice Department's.

Senator LEAHY. Well, sometimes though, people get the impression that it may also depend upon just how eager a particular department is to comply with the FOIA. That is one of the reasons for this hearing—to determine whether the delays, the complexity, the increased cost reflect the fact that you have a different issue or reflect a different philosophy about complying with the FOIA.

In that regard, let me just go through some of your testimony. You took the time in the submitted testimony to walk the subcommittee through a whole history of the Freedom of Information Act and a number of the amendments to it.

I just want to remind you of one thing. The Reagan administration contemplated a complete rewrite of the Freedom of Information Act in 1981. I recall that proposal coming up here, but the committee refused to adopt the administration's approach.

Now, another theme in your recitation of the history of the act is that, although the Senate came to bipartisan agreement on certain limited areas of reform, the House refused to adopt our proposal. But let me remind you of one area in which the House did agree to modify the Freedom of Information Act: the revised fee waiver procedures in the 1986 Freedom of Information Reform Act which was included in the 1986 drug bill.

Now, that bill, including those amendments, went back and forth between the House and Senate and received real consideration and debate on the floor of both bodies. Now, you have said that that legislative history is conflicting and sparse. That is not the way I read it at all.

Isn't it true that the floor statements on the Freedom of Information Act Reform Amendments in the 1986 drug bill amount to both

a majority and minority report on the amendment that I offered on the Senate floor, with Congressmen Kindness and English joining me in the majority, and Senator Hatch in the minority?

Don't you have really majority and minority views pretty well laid out in that legislative history?

Mr. MARKMAN. Well, Senator, to respond to your first point, I think the Department—and I hope in my testimony we have been very candid in setting forth the policy disagreements that we respectfully may have with you, and those——

Senator LEAHY. Which is perfectly appropriate.

Mr. MARKMAN. Right.

Senator LEAHY. Nobody disagrees with your having those.

Mr. MARKMAN. But I don't think there has been very much criticism of the day-to-day administration of the Freedom of Information Act by our Office of Information and Privacy. As I have indicated, they are responsible for several thousand appeals every year; they provide outstanding guidance to other agencies.

And to suggest that the disparities between the response time in HHS and the Justice Department have something to do with the lack of commitment to the act, I can simply say is not accurate.

There are many aspects of the Freedom of Information Act that I have explicitly said ought to be changed, but until they are changed we are absolutely committed—indeed, we have no alternative but to administer the act in a way consistent with congressional intent, and I think we have done that, and we have done it as aggressively and conscientiously as we possibly can.

Senator LEAHY. But I don't see that attitude in your testimony, Mr. Markman. First, two points. One, in the areas where the administration disagrees or the Department of Justice disagrees with the Freedom of Information Act, of course, it is perfectly appropriate for you to come up here and testify, seek to have it changed, and so on.

But until it is changed, it is the law. Nobody at the Department of Justice is above the law, nor is anyone in any other department. Yet, in your testimony, you certainly ignore the majority view as set out in the legislative history.

I just wonder whether that is an oversight or whether that is an indication of your unwillingness to accept the way the law went and the way the changes went.

Mr. MARKMAN. No, sir. As a matter of fact, we were very supportive of the 1986 reforms in the Freedom of Information Act, and think they have served greatly to ameliorate some of the problems in the Freedom of Information Act.

In attempting to implement those changes, both in the law enforcement area and the fee waiver area, as well as other areas, we have attempted to look as conscientiously as we possibly could at the text of that act. We have certainly looked at the legislative history, but I think you would certainly agree that the legislative history on the 1986 amendments may provide a bit less guidance than legislative histories usually do, in light of the fact that there was no floor debate, there was no committee consideration. The bill was basically tacked on to the drug bill at the 24th hour.

What we attempted to do in piecing together legislative history was, of course, to look at your remarks and those of Senator Hatch

in the FOIA legislation that proceeded through the Senate in the early 1980's, as well as look clearly at the statements that you and your colleagues put in the record at the time.

But I must observe, as I did in my testimony, that there was an inordinate amount of conflict and there was an inordinate amount of inconsistency in the very few statements that were put in contemporaneously with the 1986 amendments, but where there was guidance to be derived from those, we certainly tried to pay a great deal of attention to it.

Senator LEAHY. You know, when you talk about the bill coming in at the last hour, a lot of it was negotiated with the Department of Justice at great length before. The Justice Department had negotiated with Congressmen Kindness and English in the House on the fee provisions.

Now, when Senator Hatch referred to commercial requestors during the 97th and 98th Congresses, he was referring to what you now call the industrial spies or "corporate lawyers seeking business secrets of a client's competitors." That judgment is sort of in the eye of the beholder. I will let you and Senator Hatch debate that point, but, you know, sometimes the language seems to change.

Well, let me give you another example. You are familiar, are you not, with the proposal that the OMB adopted in its guidelines in the 1986 fee waiver amendment to limit the definition of "educational institutions" to schools?

Mr. MARKMAN. These were the fee limitation regulations.

Senator LEAHY. That is right, but the OMB proposal would take the definition of "educational institutions," which are to be handled differently on fees under the statute, and limit that just to schools. You are familiar with that?

Mr. MARKMAN. Yes, sir.

Senator LEAHY. Did your office advise the OMB in any way about whether to adopt this definition?

Mr. MARKMAN. Well, of course, the Congress gave ultimate authority to OMB to develop these guidelines, but——

Senator LEAHY. But did you advise them on that?

Mr. MARKMAN. Yes, sir. We had a number of consultations with them and we certainly offered our 2 cents' worth of advice wherever we could.

Senator LEAHY. And what did you advise them on limiting "educational institutions" to schools, only to schools? Did you advise them that way?

Mr. MARKMAN. Well, there were a number of elements of our discussion, but one of the elements related to the definition of educational institution, and I think we were concerned about some of the earlier definitions that incorporated the ideas of preschools and nursery schools and literally any individual who might be teaching another individual.

I think we wanted to focus upon what the traditional definition of an educational institution was, what the average person, what the average member of Congress would tend to think about when they used the term "educational institution."

Senator LEAHY. Is that a yes or a no?

Mr. MARKMAN. I am sorry, yes or no to what question?

Senator LEAHY. Did you advise them to limit the definition of "educational institutions" to schools?

Mr. MARKMAN. I think the general drift of our recommendation was in that direction, yes, sir.

Senator LEAHY. That is neither a yes or a no. It is a "sort of?"

Mr. MARKMAN. Generally, generally, pretty much.

Senator LEAHY. Well, you know, you just said now in your testimony that you wanted to limit the definition to schools because you felt that was basically what Members of Congress would think of as "educational institutions."

But if you look at the legislative history, we didn't limit educational institutions to schools. If you read that history, we also meant the Heritage Foundation, the Brookings Institution, the American Enterprise Institute. I mean, those are three that go across the political spectrum.

In fact, we meant to include new organizations like the National Security Archive within the definition of "educational institutions." These organizations, all the ones I have named—and we could give a list of several others, I am sure—conduct research; they produce policy papers, background information which Congress uses to consider legislation.

They are centers of research. They often have scholars on sabbatical there working on these things. They disseminate information. They write op-ed pieces; they promote political debate. They give the pros and cons on issues.

Is there anything more they would have to do to be considered educational?

Mr. MARKMAN. Well, Senator, I guess this is another one of those areas where we didn't find the legislative history to be quite as clear as you did. Generally, we agree with Judge Penn of the D.C. District Court, who not too long ago observed that the elimination of the words "public interest" in that section, something to which Senator Hatch referred in his legislative history with some—provided some significant guidance on what the term meant, and to the extent that the term "public interest" was eliminated, to the extent that institutions like the Archive were explicitly excluded from the definition by some of your colleagues, including Senator Hatch, we thought that was instructive.

Ultimately, we didn't put the entirety of our decision on Senator Hatch's legislative history or your legislative history or any individual member's. We tried to——

Senator LEAHY. I don't think you put it much at all on mine. I was in the majority on that, but that is OK. Go ahead.

Senator HATCH. Well, actually, let me correct the record. I don't think there was a majority or minority. I mean, everything was unanimously adopted by the committee and we had differences.

Senator LEAHY. We are talking about what went into the record at the time of the passage——

Senator HATCH. Oh, I see.

Senator LEAHY [continuing]. Which brings in, also, Congressmen Kindness and English and others.

Mr. MARKMAN. Yes. I would also have to observe for the record that given our concern about the proposed treatment of the Security Archives Center and similar institutions, it would have been ex-

pected that we would have raised concerns with yourself or Senator Hatch or Congressman English or Congressman Kindness if indeed that language had clearly intended to cover those kinds of institutions.

The bottom line, of course, is that whether or not the Security Archives fits within the definition of commercial requestor or representative of the news media or what category it fits into, to the extent that any request on the part of the Security Archives is one deemed to satisfy the public interest, they will get an entire fee waiver. So that is only the threshold question.

I think probably the more important question is whether or not their request would be deemed to be in the public interest in any given context.

Senator LEAHY. Now, educational institutions were retained?

Mr. MARKMAN. Yes, sir.

Senator LEAHY. What about libraries? How do you treat libraries in determining their fee categories?

Mr. MARKMAN. That is a very, very tough question, Senator, and I think it goes back to my comments in the opening statement that there are a variety of public interests that need to be respected in this process.

To look at this in the context of the Security Archives, in particular, we have a great deal of concern about individual requestors using taxpayer subsidies, which is, in effect, what they are doing when they request and obtain fee waivers, to build public libraries.

This is true whether it is in the area of defense and security information, whether it is in the area of environmental policy, whether it is in the area of banking, whether it is in the area of national parks policy.

We don't think that the Congress in the statute or in a clear legislative history has said that it is the obligation of the Federal Government to allow individuals to set up these vast record repository libraries.

The fact is we have a National Archives, we have a Library of Congress, we have other departmental libraries.

Senator LEAHY. Now, let us just take one. The Library of Congress—do you agree that it is a government institution with a duty to disseminate information to the public?

Mr. MARKMAN. Certainly, I would agree with that, Senator.

Senator LEAHY. But then if you drop down to, say, community libraries, are they still in that category?

Mr. MARKMAN. No. We are talking about private libraries. The question is whether I, Steve Markman, have the right to go to government agencies and make as many requests as I want to, dozens, hundreds, thousands of requests, and build up a library on some subject that I think needs to be built up on—say, national parks policy—and I can require the government to subsidize the development of that library at considerable cost to the taxpayer.

Senator LEAHY. Well, what about a community library?

Mr. MARKMAN. Community libraries?

Senator LEAHY. A community library, a public library, a State library.

Mr. MARKMAN. Well, I think public libraries are one of the greatest of all of our government institutions, certainly.

Senator LEAHY. Are they then entitled to favorable treatment under the 1986 fee provisions?

Mr. MARKMAN. I think they are entitled, in the context of the Freedom of Information Act, to the same treatment that any other requestor is entitled. There is no preferred treatment of libraries, nor is there any second-class treatment of libraries. They are entitled to fee waivers on the same basis as any other requestor, and that is if they satisfy the fee waiver standards that the Congress explicitly put in the law.

Senator LEAHY. They wouldn't fall under educational institutions?

Mr. MARKMAN. Libraries in many cases, if not in most cases, would fall under educational institutions; certainly, they would.

Senator LEAHY. Well, that is my question.

Mr. MARKMAN. Oh, absolutely, I think they would. But, again, there is a second question, whether or not they are entitled to fee waivers simply by virtue of being a library, and there I would say no. Each request has to be analyzed in an individual context.

Senator LEAHY. In your written testimony, you keep referring to "one legislative statement." Is that new Justice Department code for "the statement of the Senator who offered the amendment"?

Mr. MARKMAN. I am sorry. Could you repeat that?

Senator LEAHY. You keep saying in there "one legislative statement" over and over in your testimony. I just wondered if that is a shorthand for the "statement of the Senator who offered the amendment."

Mr. MARKMAN. No. There are a number of conflicts in the legislative history, as you know. At least that is our belief, and——

Senator LEAHY. Let me give one of the specifics. It may make it easier.

Mr. MARKMAN. OK.

Senator LEAHY. I will read from it:

> The individual legislative statements made regarding the fee waiver revision were found to be quite conflicting, both among themselves and also in some cases with the plain language of the statutory provision itself.
>
> For example, though one such legislative statement suggested that fee waivers should be granted where disclosure could contribute to public understanding in any meaningful way, the specific language of the statute requires the contribution to be a significant one.

Now, that legislative statement is quite conflicting with mine; that is why I happened to notice it. You didn't seem to like the definition of "significant" in the floor statement. How would you define "significant?"

Mr. MARKMAN. I think we may have had an honest disagreement on what the word "public" meant there. There was——

Senator LEAHY. What about "significant"?

Mr. MARKMAN. I think we felt that the definition of "significant" was much closer to the definition that one Senator offered, which was "significant" than it was "in any meaningful way." We think it is a very subtle difference. There is very much of a nuance difference, but we felt——

Senator LEAHY. Would it surprise you if I told you how Webster's Dictionary defines "significant"?

Mr. MARKMAN. No, sir.

Senator LEAHY. As "having meaning." I mean, are we balancing angels on the head of a pin here? You say you disagree with this word "meaningful" and you want "significant." "Significant" means "having meaning."

I don't want to play games here, Mr. Markman, but it almost seems to me that we are going into sort of a 15th century philosophy debate, and we really are putting angels on the head of a legislative pin unnecessarily.

And if all we did was debate back and forth among ourselves how many angels are going to fit there, that would be fine. You know, we would just sort of chew up some hours. But if the effect is denying people access to information on what their government is doing, then it creates a different thing.

I don't see the difference between "significant" and "meaningful" insofar as Webster's doesn't, but maybe there is a different dictionary.

Mr. MARKMAN. Well, Senator, not to employ a pun, but I don't see any significant difference between the two definitions either, and I am not sure how we have adopted a definition that is inconsistent with even your understanding of "significant."

I think what we basically said in the guidelines was "significant." We simply restated the term. I don't know that we rejected your statement.

Senator LEAHY. Well, your testimony comes across as though the legislative history—at least the statement I provided as the proponent of the amendment—were to be rejected because it didn't use a word that you wanted, even though your word had the same meaning.

Let me just ask you one last question and then I want to yield to my good friend, the distinguished Senator from Utah, who is here and will have a chance to give his——

Senator HATCH. A feeling of deja vu.

Senator LEAHY. It is deja vu all over again, Orrin.

Senator HATCH. That is right.

Senator LEAHY. He will give us his usual spirited defense of the Department of Justice, but before we do that, I sent a survey supplementing the annual FOIA reporting requirements to 40 agencies in preparation for this hearing. I asked a whole lot of questions about fee determinations, document availability, expedition procedure, staffing, electronic recordkeeping.

Now, a lot of the agencies—in fact, most of them—did an extraordinary job. They went through their files, they answered the questions carefully, they contacted staff to clarify questions.

If an agency thought it couldn't complete the request on time, they contacted us, and I said, go ahead we will modify the request, so that we could get a responsive answer in time.

The Justice Department sort of stood out from all those. You responded that you could not complete the survey without an inordinate expenditure of agency personnel. You didn't contact me or staff, as I understand it, about modifying the request.

Why did you stand out so differently from everybody else?

Mr. MARKMAN. Well, Senator, that is not my recollection of——

Senator LEAHY. What is yours?

Mr. MARKMAN. My recollection is that people from our office did indeed talk with your staff and indicated that to comply fully with the questions that you had set forth would be to consume, I think, hundreds and hundreds of additional man-hours simply because we did not keep information the way the questions were structured.

We discussed this with most of the other agencies that were the subject of your correspondence and they all shared our concern. I don't think anybody responded in any more detail than the Justice Department did. We complied fully; we complied in a timely manner. We talked to your staff.

We indicated our concerns about the burden that fully responding to those questions would put upon the Department, but we were in very close consultation with other offices of the government who completely concurred in our concerns about the burden that was being imposed upon us.

Senator LEAHY. Well, except that a number of the questions required a review of files and your answer just came back, "no data," "no data," "no data."

Mr. MARKMAN. Well, that is indeed the response. I think we made clear—if we didn't make clear then, we will certainly make clear now, if you want us to do that information, if you want us to compile that information, we would certainly like to discuss it with you, but that information has never been compiled.

If there happened to be one or two agencies that may accidentally or just by happenstance kept——

Senator LEAHY. I think we are talking about 40, not 1 or 2 agencies. We sent this to 40 agencies, and most of them were able to answer the questions, with some clarity and certainly with a great deal of depth. So, you know, it is not that one or two agencies might have had some information that happened to fit our questions.

Out of 40 agencies, most of them were able to do it. It was only the Department of Justice that seemed to have the difficulty.

Mr. MARKMAN. Well, there was no way that we could have done that without expending hundreds and hundreds of hours, and it was also our understanding that that was the identical situation in which most other agencies found themselves.

I would be fascinated to see how they put together responses to those questions.

Senator LEAHY. I would be happy to show you.

Mr. MARKMAN. I am sure there are some smaller agencies that may have been able to do that, and I am sure there are some agencies that, by happenstance, did keep records in that way. But most of the major FOIA-responding agencies could never put that information together in any more detailed way than the Justice Department did.

Could I make just one more response, Senator, to your previous question?

Senator LEAHY. Sure.

Mr. MARKMAN. I just don't want to leave the committee with the idea that somehow we were engaged in this Talmudic process of trying to parse out words, except that is obviously an important task that any executive agency has in trying to give meaning to what the executive branch did.

I think the key distinction between your definition, and it was a reasonable definition, and alternative definitions that were suggested on the floor, which we also felt to be reasonable, was the idea that it could have any meaningful contribution.

I think our view of the better meaning of that word was that overall there had to be some kind of meaningful contribution; not the slightest meaningful contribution on the part of the smallest part of the record, but as an overall matter there had to be some kind of meaningful contribution.

In our judgment, that just better comported with the idea of what "significant" meant. The purpose was not to deny access to information. I doubt, as a real world matter, that it will result in any kind of significant denial.

But on the other hand, we do have an obligation to try to give conscientious meaning to the language set forth by the Congress, and I don't think anybody can look at our guidance and say we didn't make a reasonable, responsible effort to try to do that on a word-by-word basis.

Senator LEAHY. Let me just ask you this as a hypothetical, Mr. Markman. Some of these definitions do become subjective; in a number of them, there is no way that you can anticipate every circumstance with an objective one.

But if you are dealing with subjective definitions, might the end result be a lot different between an agency strongly committed to the philosophy set out in FOIA and an agency that is resistant to the philosophy set out in FOIA?

I am not suggesting whether you fall in either one of those, but might not the result be entirely different when you are dealing with subjective guidelines?

Mr. MARKMAN. I certainly think as an abstract, hypothetical matter, that would always be the case.

Senator LEAHY. Thank you.

Mr. MARKMAN. I would like to emphasize, though, that in a number of instances, I think we gave definitions or interpretations to words that you might agree would be definitions or interpretations that reflect an effort to try to encourage as much disclosure as possible.

For example, in defining "commercial," we explicitly told agencies that were responsible for enforcing this that the principal objective of journalists and members of the media should not be thought to be commercial, even though there was an incidental commercial benefit that they served.

Most of them worked for for-profit newspapers, and I think a crabbed or a literal definition of the term "commercial" could have been very detrimental, very injurious to the access that members of the media would have to government information.

So in that area we are very explicit and very forceful in telling government agencies that they should not look upon the mission of the media as being primarily, or even in a significant way, commercial, but that they should be thought generally to be pursuing the public interest in their requests.

So I think that needs to be said to give some kind of balance to the interpretation process that we engaged in.

Senator LEAHY. I will come back with a couple of specifics on your interpretation, but I have intruded on my good friend from Utah's time and, as usual, he is generous and cooperative.

Senator HATCH. He describes me very well is all I can say.

Senator LEAHY. I am just waiting to see it in the campaign ads now.

Senator HATCH. That is right.

Senator LEAHY. Kiss of death, an endorsement from me. Go ahead, Orrin.

Senator HATCH. No. I am going to use it, let me tell you.

I am happy to be here, and I want to thank you, Mr. Chairman, for allowing me to be here because I am not a member of this subcommittee. But you and I both have devoted a pretty significant time of our Senate careers to trying to resolve these problems regarding FOIA, so I appreciate you allowing me to participate with you, and I appreciate the leadership you provide in these areas.

As I understand it, Mr. Markman, the Department of Justice has like 60,000 requests a year. Is that correct?

Mr. MARKMAN. Yes, sir.

Senator HATCH. And these cost an average of about $300 per request. Am I wrong on that?

Mr. MARKMAN. I think if you divide all the total expenditure by the requests, it is approximately that figure.

Senator HATCH. I see. These are more complex requests than the average agency in government?

Mr. MARKMAN. Not necessarily the most complex, but certainly more complex.

Senator HATCH. On balance, they are more complex?

Mr. MARKMAN. Yes, sir.

Senator HATCH. Do they involve to a large degree classified information?

Mr. MARKMAN. A significant degree of classified information.

Senator HATCH. So that is important, also?

Mr. MARKMAN. Yes, sir.

Senator HATCH. And then they also have a lot of informant information in the requests that are made of the Justice Department?

Mr. MARKMAN. Yes, sir, we do.

Senator HATCH. One of the things we were trying to solve in this mosaic of disclosures that can occur has been the drying up of informant testimony and offerings through the years to the Department of Justice as well as other law enforcement agencies. Is that fair to say that?

Mr. MARKMAN. Yes, sir. Your legacy and that of Senator Leahy in the 1986 law enforcement provisions was and has been of enormous value to law enforcement efforts in the country.

Senator HATCH. Well, both of us have worked hard to try and solve those problems.

Mr. MARKMAN. Yes, sir.

Senator HATCH. But what I am trying to bring out is that other agencies don't quite have the same complexity, the same classified problems, the same informant testimony, and the same amount of effort and the same number of requests that the Department of Justice has.

Mr. MARKMAN. That is absolutely correct.

Senator HATCH. Well, you see, if free requests are allowed to everyone or broad categories of different organizations, then the government could become a broad public library for requests and information, and it seems to me that would clog the FOIA channels pretty quickly for journalists and public interest functions.

Therefore, if all of this was free, as some would advocate, then it would clog, it seems to me, all the channels in frivolous ways. Now, do you agree with that or disagree with that?

Mr. MARKMAN. Again, I absolutely agree. The FOIA channels are clogged today, and they are clogged today as a result of a wide variety of unexpected and unanticipated classes of requestors burdening the FOIA system, and in the process they are ensuring that those individuals that have been the traditional beneficiaries of FOIA, the journalists and the representatives of the media, are pushed increasingly to the end of the queue.

Also in the process, increasingly we see those requests that are only for narrow, parochial interests being given more and more time, while those requests coming from journalists and historians and authors are given less and less time in this process.

Senator HATCH. Well, I may not recall very clearly, but as I recall, the Drug Enforcement Administration documented that 60 percent of all of the FOIA requests to that agency came from imprisoned felons or drug dealers, just to give you an illustration.

The legislative history was, at best, it seems to me, a checkered record as we went through the enactment of that act. Individual Senators liked different portions of the 1986 act and individual Senators disliked certain portions of that act, so that made it difficult to do.

But it sounds like "educational institutions" really did mean universities and schools. If you allow them to mean anybody who might be gathering information, then almost anybody would qualify as an educational institution.

Mr. MARKMAN. Well, there was a concern on our part, and we communicated that concern to OMB, that there be some definition susceptible of reasonable interpretation by the hundred-plus agencies responsible for administering the Freedom of Information Act.

Senator HATCH. Well, if you broaden it too far, then if the Nazi Party had requested things they could claim they were an educational institution, or Lyndon LaRouche or any number of other organizations that claim that they are educating the public under their rights of free speech.

You know, I think you have to set some reasonable guidelines and there have to be some limitations in those guidelines if we want government processes really open and not bogged down for journalists and those who really are entitled to receive these informations free.

Now, Senator Leahy said that the Hatch remarks on the 1986 law were minority views, but I wanted to point this out, that, in fact, all of the provisions of the 1986 law, including the Leahy amendment, were unanimously adopted. So there were no minority views in that sense with regard to those. Would you agree on that?

Mr. MARKMAN. Yes, sir, I would, and as I indicated earlier, most of the legislative history that we relied on actually came from the majority report that you and Senator Leahy had put together earli-

er in the 1980's on FOIA legislation that had indeed passed this committee and the entire U.S. Senate. Those provisions are almost identical with the ones that ultimately became part of the law, so naturally we relied on those heavily.

Senator HATCH. Well, commencing back about 1981, we really started to look into this area and we did the most comprehensive set of hearings in the history of the Freedom of Information Act which, of course, was first enacted in 1966.

And during that period, I think both Senator Leahy and I, and others, learned the tremendous benefits of having openness in government. I changed a lot of my viewpoints as we studied that topic together. In particular, investigative journalists testified that FOIA had often provided the public with information about the government which might otherwise not have been available had that act not been put together and, in my opinion, that is the essence of good democratic government.

But those hearings also disclosed that some fine-tuning in the act was necessary. We reached a consensus that the act's mission of promoting good government would be difficult if the act inadvertently jeopardized the public's interest, for instance, in the safety of law enforcement informants and, of course, if it jeopardized the effectiveness of confidential investigation.

And it was brought out by FBI Director Webster through his presentation of 204 specific examples of when FOIA had endangered informants and investigations, and then I also brought out that the DEA testified that, as I recall, 60 percent of all requests were coming from convicted felons or known drug dealers.

So, as a result, the whole committee, the entire Judiciary Committee, cooperated in coming up with the 1986 comprehensive amendments in the drug bill, and we amended FOIA to alleviate this particular jeopardy to the law enforcement function.

In fact, the seventh exemption in FOIA, which was designed to protect law enforcement activities, was broadened to ensure the safety of informants and the secrecy of undercover investigations, two areas that I was particularly interested in.

At the same time, the 1986 law provided for assessment of processing costs to requestors of information under FOIA. Of course, as I saw it, the objective of that change was to ensure that the act would pay its own way and that frivolous requests would not clog up all of the FOIA channels.

So to guarantee that these new fees did not jeopardize the essential openness of our government, we did that. We did expand the provisions to grant journalists and researchers enhanced access to government records. We agreed on that and we think that was the right thing to do.

Now, I appreciate the chairman and his and my work together and the lengthy mutual interest that we have had in the success of the Freedom of Information Act, and I think that holding these hearings is very, very important.

But as we remember, one of the grave deficiencies of FOIA prior to the 1986 amendments was that a response to a request could tip off criminals to the existence of criminal investigations.

If a criminal wrote asking for files on any drug investigation, say, on G Street in Miami, for instance, the DEA or FBI might be

able to withhold the records. But the act requested the agencies to respond and tell the requestor that the reason for denial was the existence of an ongoing investigation.

Now, of course, the criminal would need no more indication that it was time to shut down the operation on G Street. By enacting an exclusion for this type of situation, we hoped to alleviate the problem.

Now, do you think that the 1986 law has really helped with these type of situations?

Mr. MARKMAN. Yes, we do think the 1986 law has helped considerably, and I emphasize that the new exclusions that were put in the law to which you are referring have not been invoked on a great number of occasions. In fact, I think each one of them has probably been invoked less than a dozen times.

But in each one of those cases, it was the studied opinion of the FBI that had that exclusion not been available, there might have been a serious risk of the disclosure of information that could have jeopardized individuals or that could have jeopardized the smooth functioning of law enforcement activities.

So, yes, I think it has been an extremely valuable contribution and it has gone a long way toward addressing the law enforcement concerns that have been expressed for many years by FBI Director Webster and others in the DEA.

Senator HATCH. Another problem under FOIA was the mosaic concept that was explained by Director Webster. In other words, the act allowed the FBI to exclude information that "would disclose" an informant.

Now, the problem was that the FBI doesn't know what little piece of information in a record might be the key to an informant's identify. For instance, if the record says the informant was a she, the robber might know that he only told one girlfriend about the heist, and that would identify the informant. Or if the record says that the informant used the word "pop" to describe a soft drink, the criminal might know he has only one friend who uses that word.

Now, do you have any evidence that the 1986 amendments have improved these earlier difficulties with regard to the mosaic problems?

Mr. MARKMAN. Well, certainly, I have anecdotal evidence that the change in the 1986 law, particularly the "would" language to "could" language, has had some very beneficial impact upon the ability of the FBI to try to protect that information which, when pieced together with other information that might be publicly available, would provide information to the public that probably would be best kept confidential.

Senator HATCH. OK. One of the major reasons that we decided to assess processing fees in the 1986 act was to alleviate the endless lines of frivolous FOIA requests. We were concerned that some frivolous requestors who wanted Federal officers to count through all the records of the JFK assassination might consume FOIA resources that might be better spent helping journalists and worthy requestors.

Has the processing fee provision helped this problem or are additional corrections needed to make sure that whatever resources the government has available under FOIA are well spent?

Mr. MARKMAN. Well, I think because of a variety of the burdens that were placed upon the government to develop new fee waiver guidelines and new law enforcement guidelines and fee guidelines and the fact that the individual agencies had to go through the notice and the review process, as well as OMB, it has been a long time implementing the fee provisions.

Our early indications are that they have had a positive impact. Obviously, there are some new complexities introduced in the act by virtue of the fact that we now have three categories of requestors and some are entitled to be charged these fees and others entitled to be charged those fees.

But, certainly, I think the new treatment of commercial requestors—in particular, the obligation that they have to pay not only the search fees and the duplication fees, but also the processing—fees is a very positive step, a very important step in the right direction.

Whether it is the final step, the ultimate step, I think it is too early to say, but it is certainly a very positive step.

Senator HATCH. All right. One provision that was adopted by the Senate in the 98th Congress but not included in the 1986 amendments concerned discovery records. Now, the extensive hearings of the Judiciary subcommittee had established earlier that sometimes lawyers use FOIA rather than engage in court-supervised discovery procedures during litigation.

Do you think there are continuing needs to consider changes in this particular area?

Mr. MARKMAN. Yes. My principal mission here isn't to recommend a variety of changes, but I think my statement makes fairly clear that this would be one of those amendments that we would be quite enthusiastic about, limiting the ability of litigants to use FOIA as an alternative to traditional civil discovery rules.

We don't think that is one of the purposes that FOIA is predominantly designed to serve, and we think these requests are clogging up the system very, very considerably, and the public derives very, very little benefit from this process and they have to subsidize individual attorneys and litigants in disputes that are not public disputes at heart, but basically private controversies. So, yes, we would favor that kind of change in the long term.

Senator HATCH. OK. Although the Senate approved provisions governing confidentiality of business records in the possession of Federal agencies, this was not included, as I recall, in the 1986 law.

We received much testimony in earlier hearings that foreign requestors use FOIA to get information about our own domestic companies, which may in certain instances result in a form of really commercial espionage.

Does this continue to be a problem, and should the committee consider legislation in that particular area?

Mr. MARKMAN. Well, this continues to be a very significant problem. There is a great deal of litigation that continues to take place over what the rights are of individuals or enterprises that submit

commercially valuable information or trade secrets to the government.

Certainly, the President's Executive order last year on that kind of information went a long way toward establishing uniform procedures among government agencies to help protect business submitters, but I believe that further changes, further protections for businesses could definitely be useful, for example, providing them expedited access into the judicial branch, something they don't currently have.

Senator HATCH. How many foreign requests are we receiving? How many requests come from foreign requestors?

Mr. MARKMAN. I don't have a figure there, Senator. I would certainly be glad to try to put one together, but we don't keep figures along those lines, although it is clear that—I don't know if I would say a significant number of requests come from foreign users, but there is certainly a fairly steady trickle of requests that come from foreign users.

That would not be the principal problem among those that I mentioned in my comments today. It is simply a question of whether or not the American taxpayer has an interest in subsidizing those kinds of requests when, A, they would have no concomitant ability to go to the foreign countries and request information and, B, where the benefits of those records are generally never disseminated in the United States, but generally disseminated, if at all, outside the United States and clearly serve very little public interest in the sense of American public interest.

Senator HATCH. All right. I want to thank you, Mr. Markman, for your statements here today and for helping us to understand this a little bit better. I also want to thank my colleague from Vermont for holding these hearings and allowing me to appear and ask some of these questions because these matters have bothered me for a long time.

I still think that we probably need to fine-tune even the 1986 amendments somewhat, but I think we have come a long way, at least, toward trying to resolve some of the problems that arose during the hearings that we had back then.

Senator LEAHY. We also wanted to make sure, though, just what we are dealing with.

Senator HATCH. Yes.

Senator LEAHY. And while we can deal with anecdotal things and all, if we want to amend the statute, we need to make sure we are doing it accurately. I remember the administration in its attack on FOIA last year was saying that the Japanese had gotten improperly some space shuttle design data from NASA through FOIA.

Unfortunately, of course, when we brought NASA up here and asked them about that, they said it was news to them. We asked anybody who might have really been able to prove that story, which was a very good story. I asked them if there was any basis to it. They said no, but it didn't detract from the point they were trying to make that maybe it might have happened or it could possibly have happened. The fact that it didn't happen didn't seem to deter anybody who was opposed to FOIA.

And it goes back again to the point I have made that it is in the eye of the beholder and we can go different ways depending upon

how favorable people are toward FOIA or not. Let me give you an example on an experience I had.

Sometimes we create problems for ourselves. When I was a prosecutor, I came in at a time when a lot of changes were happening, *Escobedo, Miranda,* the *Brady* case on disclosure, and so forth.

Prosecutors all over the country were having all these kinds of meetings, saying, how do we handle the people that are going to want to see our files? They are going to want to ask what we are doing, and on and on and on.

In my own State, we have 14 counties. I represented the one that had about a quarter of the State's population in it. Prosecutors were asking how do we keep defendants from looking in our files, and so on.

I found an easy way to do it. Every time I had a criminal matter, we opened two files. We put all the originals and reports in one; we put xeroxed copies of everything in the other.

If we had a confidential informant, because the courts could ask to disclose that fact, we just used a number for something like that, but we just put the whole file in, and when counsel was assigned or entered their appearance, we gave them a copy of the file. We told them where the file cabinet was in the courthouse where they could just go, and every time we had anything new in our file a copy got added in that.

You know, it did two things. One, it freed up an awful lot of time of my assistant prosecutors so that they could actually try cases and not get involved in arguing motions. Two, we never lost a case as a result of it, and we didn't tie up a lot of our time and resources, which is one of the things to consider here.

I realize that when we are dealing with organized crime and all, that we have matters of great concern, but that is why Senator Hatch and I wrote legislation to help take care of that situation.

I still go back to this: the FOIA works if the administration is committed to making the FOIA work, and the FOIA can create problems almost insurmountable to people if the administration doesn't want it to work. It is as simple as that.

It is like the example I gave of the Environmental Protection Agency. The laws against pollution are on the books, but if the signal is given that the violations are not going to be prosecuted, then pollution goes on. If the signal is given that polluters will be prosecuted, then pollution stops.

It is the same with just about any other thing. There is no way that the Congress can mandate adherence to laws exactly or the best performance of the laws. It depends upon an administration, a department, and their own philosophy.

Let me give you a hypothetical fee determination. A reporter wants to write a history book on organized crime in a particular city and he knows he is going to need records from the FBI to do a thorough job. It is a question of how organized crime might have infiltrated law enforcement and public officials.

He makes a FOIA request and he asks for a fee waiver. Then he goes to the chief of police and he says will you endorse the project, and the chief says sure; he writes a letter in support.

Then he goes to the mayor; the mayor also supports this look into corruption and organized crime, city officials, police, and so on.

He gets a letter of support. And then he gets a letter from the Public Safety Commission, and he gets letters from Members of Congress and a letter from his Senator.

Now, is that a showing of public interest at that point?

Mr. MARKMAN. Senator, we have enough difficulties processing our very real requests for information. It is pretty tough for me to respond to a hypothetical request like that. Certainly, that is the kind of information that would be extremely instructive and informative in attempting to make the determination of public interest, but I wouldn't want to say there is any single item that one requires in making this determination or any single thing without which you couldn't make a public interest determination.

It necessarily has to be on a case-by-case basis, and we have hundreds and hundreds——

Senator LEAHY. I think you know the case I am referring to. I am referring to the *Maccabee* case in Minnesota.

Mr. MARKMAN. Yes. Well, I am certainly——

Senator LEAHY. Would you say there is a showing of public interest in that case?

Mr. MARKMAN. I would say there is a showing in many respects of a public interest in that case.

Senator LEAHY. Should it be considered in the fee-waiver determination?

Mr. MARKMAN. Well, I think just a little bit of background on that case is necessary if we are going to talk about it intelligently. During the past 6 years, Mr. Maccabee has made over 350 FOIA requests to FBI headquarters and field offices generally relating to organized crime matters in Minnesota.

These requests encompass well in excess of 10,000 pages of records. He has made additional requests to other components of the Justice Department, including the Executive Office of the U.S. Attorneys, the Criminal Division, the Drug Enforcement Administration, as well as requests to two or three other government agencies.

We have adjudicated over 30 of his administrative appeals based on the denial of component records. His fee waiver appeal was one of the most complex that we ever adjudicated. Despite that, we granted a 50-percent waiver, overruling the FBI's decision that he was entitled to only a 20-percent waiver.

Because of the complexity of the request, because of the volume of the request, it took us nearly 3 years to adjudicate this appeal. We have had to increase the allocation of attorneys in our office simply to deal with that one appeal.

Senator LEAHY. Just because of 10,000 pages?

Mr. MARKMAN. Pardon me?

Senator LEAHY. You say there are 10,000 pages?

Mr. MARKMAN. Well, it is also an unusually complex 10,000 pages because of the fact that he is dealing with some very sensitive organized crime figures and there are still some individuals whose personal privacy interests would be very heavily implicated by the wrong kind of release of information.

Senator LEAHY. The *Rosenberg* case was 450,000 pages, was it not?

Mr. MARKMAN. Well, that was an incredible request, too, and, believe me, that burdened the FBI considerably.

Senator LEAHY. Yes, but maybe the country was helped by getting all those facts out, too.

Mr. MARKMAN. Well, I don't gainsay that. I don't gainsay that the country might be helped by full compliance with Mr. Maccabee's request either. We are trying to comply. We have tried to accommodate his situation as much as possible, but I think you have to recognize that when you have a very small number of users making an inordinate demand upon the system, not only does it put other individuals at the back of the queue, but it also makes it very difficult for us to deal with that single individual and fully respond to his requests. We have tried to do so in a good faith manner.

Senator LEAHY. I understand, and we will have testimony on this case. Certainly, once you have seen that, if you want to add anything back, rejoinder, response, contradiction, or whatever, naturally we will keep the record open for that.

There is a 20-day time limit for administrative appeals, as I understand it. How many statutory deadlines did the Justice Department miss in 1987?

Mr. MARKMAN. Senator, as with most government agencies, we miss most of our deadlines. The fact is there are more cases coming our way under FOIA. We have 1,500 cases coming to the government every working day of the year. There are more appeals, they are more complex, and yet we have no more staff than we had 5 or 6 years ago to process these appeals.

The time limits are absolutely too short. We do everything we can to try to comply with those time limits, but neither in the predecessor administration nor in this administration were time limits a very significant constraint upon——

Senator HATCH. Should we amend those time limits and make them more reasonable?

Mr. MARKMAN. Absolutely. The only proposals, unfortunately, that I have seen in recent years would actually reduce the time limits further, including Congressman English's proposal to reduce the time limits to 5 days. That is just absolutely incredible.

Senator LEAHY. But do we amend them just for you or for other agencies? I mean, HHS missed their deadline only 41 times out of 120,000 requests. I realize you said that they have easier requests, but not all of them are easier.

Mr. MARKMAN. I think the time deadlines ought to be modified for virtually all of the government agencies, very few of which can meet the deadlines in any serious way.

Senator LEAHY. But, apparently, they are not really having a difficulty with it.

Mr. MARKMAN. They are certainly having less of a difficulty than most other agencies. But, again, I emphasize that relates more to the nature of requests coming into HHS than it does to any different level of commitment.

Senator HATCH. Maybe what we need to do is tailor it for law enforcement agencies because of the complexity and the difficulties and the classified nature and the informant problems.

I mean, you know, if you are having a rough time in good faith meeting these deadlines, maybe the deadlines are just a little bit too short.

Senator LEAHY. Or maybe they need to streamline the steps that they take to get the answers out, too——

Senator HATCH. Well, maybe that is the answer, too.

Senator LEAHY [continuing]. Because what we have done is given you a number of exemptions under FOIA to take care of those issues.

Mr. MARKMAN. Senator, this administration is absolutely and completely committed to the effective enforcement of FOIA. As I indicated in my opening statement, there are a number of considerations that have to be balanced. There are a number of public interests.

One of those interests, and perhaps the most important of the public interests, is the disclosure of information, but that always has to be done in the context of the exceptions, the exemptions that are contained in FOIA, fiscal considerations, the ability of agencies to conduct their primary mission in life.

We try to balance those things. As I indicated, that is the eternal mission of FOIA administrative agencies, to strike the right balance. If we haven't struck precisely the balance that you think appropriate, I just want to assure you it is not because of any lack of good faith; it is not because of any lack of commitment to FOIA.

It is a very difficult process and we are engaged in a day-to-day process in trying to establish the best possible balance that we can.

Senator HATCH. Mr. Chairman, would you just yield for one comment?

I would just like to welcome Mr. Dan Metcalf, with Mr. Markman. He is an expert in this area and has worked very hard on it, and I again want to compliment you for holding these hearings.

I think, Mr. Markman, our interest is finding out just what we need to do that is better for all concerned, and I appreciate the chairman and his efforts in doing this. Also, I appreciate your testimony because I think you have been articulate and very, very good.

And, you know, I can see why it is very difficult for the Justice Department not to be pushed into meeting short time limits because one mistake can mean an informant's life, and that is just one illustration of how much more difficult some of the things you deal with are compared to other agencies, although I am sure each agency could come up with some very difficult problems that they have with the requirements of FOIA.

Again, I have to go make a phone call, but I just want to thank you both for being here, and thank the Chairman for allowing me to be part of this.

Mr. MARKMAN. Thank you, Senator.

Senator LEAHY. Let us recess for just about 2 minutes. I will be right back because I have got two last questions of Mr. Markman, but I want to discuss something with Senator Hatch.

[A short recess was taken.]

Senator LEAHY. I have just two last questions. Mr. Markman, I am concerned about the fact that we have sent out questions in preparation for this, and I have been trying to make sure that all

people who have been asked to provide information on this are treated alike and that we have as solid a hearing record as possible.

You had commented earlier that you had discussed with my staff the problems of answering some of the questions, problems that other departments didn't seem to have. I don't have a record of those discussions, and just so we can close the record on this, if you could just let me know when that was that you had those discussions.

Mr. MARKMAN. I have since corrected that point. I am glad you raised it; I was going to raise that myself. But, apparently, the conversations—my recollection was that the Justice Department had spoken with your office, or your Judiciary office.

Indeed, there were several other agencies with which we had been in contact that contacted your office. I can give you the identification of those agencies.

Senator LEAHY. But not DOJ?

Mr. MARKMAN. Not DOJ.

Senator LEAHY. OK.

Mr. MARKMAN. But there were several other agencies that had been in contact with us before and after those phone calls, and it had not been me, but I had understood that it had been DOJ, but, no; it was those other agencies.

Senator LEAHY. I just wanted to make sure because I didn't know whether my records were wrong, and I appreciate that.

Mr. MARKMAN. No, sir; your records are correct.

Senator LEAHY. The last question, and it goes again to this point of what the administration's philosophy is. You pointed out the FOIA training that the Department of Justice conducts and the memos you have produced in this area.

But as I look at that, the emphasis seems to be on questions of collecting fees and withholding information. I didn't see any item in your long list of publications about reducing delays, releasing segregable portions of documents, or encouraging disclosure, unless I misread the list.

In fact, in one FOIA update you propose that agencies use the "Glomar" response—neither confirm nor deny the existence of records and exempt records from disclosure. Now, that seems to me to go well beyond the legislative intent of the 1986 amendments, no matter how you read them, no matter how you read the history—mine, Senator Hatch's, Congressmen English's, Kindness', or anybody else's.

Is that part of the training that you are providing FOIA officers throughout the country?

Mr. MARKMAN. Well, Senator, I couldn't agree with you more that reading the FOIA update is sometimes a dense experience. There are some very technical discussions in there.

Senator LEAHY. It is just fascinating.

Mr. MARKMAN. Sometimes I think it is fair to say the policies that we have developed or that we recommend, and we always develop or recommend them on the basis of our honest understanding of what the act requires, would call for less disclosure of information. At other times, they would call for more disclosure of information.

For example, we have directed agencies to treat Privacy act requests as Freedom of Information Act requests where those would result in more information going to an uninformed requestor.

We have urged the disclosure of unit price information on the part of defense contractors on a more liberal basis than had formerly been the case. We have recommended the disclosure of various kinds of governmental personnel files on a more liberalized basis.

We have argued that the Trade Secret Act was not an exemption three statute, thereby resulting in the disclosure of additional information.

There is no single policy that you can say that we are pursuing in the sense of always promoting more disclosure or always promoting less disclosure. Again, we see a balance and, as I have said several times, that is the objective that we are trying to produce in our administration of this act.

Senator LEAHY. Thank you very much, Mr. Markman. I will leave the record open if you have further points you wish to make and, certainly, as I said before, we will have other panels, one that I know we will be able to finish, and a third one that we are going to try to finish before our recess time. Certainly, if you see items in there you wish to take issue to, the record will be kept open so that you will have that opportunity.

Mr. MARKMAN. Thank you for your time, Senator.

Senator LEAHY. Thank you, Mr. Markman. It is good having you here.

[The prepared statement of Mr. Markman and followup questions and answers follow:]

Department of Justice

STATEMENT

OF

STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
UNITED STATES SENATE

CONCERNING

THE FREEDOM OF INFORMATION ACT

AUGUST 2, 1988

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here this morning to address the Department of Justice's administration of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1982 & Supp. IV 1986), the principal statute governing public access to federal information from the Executive Branch. This Act has become an essential part of our democratic system of government.

As you know, the Department of Justice exercises government-wide policy responsibility to encourage agency compliance with the Freedom of Information Act, in accordance with 5 U.S.C. § 552(e), and this responsibility is discharged by the Department's Office of Legal Policy and its subordinate Office of Information and Privacy. However, within the Department of Justice, each component bears the responsibility of responding in the first instance to FOIA requests for its own records.

The Department of Justice works hard to fulfill its responsibilities under the FOIA. In 1987, the Department acted on 60,610 requests. This was an increase of more than 4,000 from 1986, which itself was an increase of more than 4,000 from 1985. In 1987, the Department also acted on over 2,100 administrative appeals. The processing of last year's requests and appeals required the dedication of over 600 employee years. This

commitment -- just for administrative processing, not for litigation -- amounts to almost one percent of the entire personnel resources of the Department.

At the Department of Justice, responding to FOIA requests is a growth industry. Not only are the numbers of requests growing, but their complexity and magnitude seem also to be increasing. The experience of the FBI readily illustrates the massive nature of this activity: Last year the FBI alone released over 3/4 of a million pages under the FOIA, and the Bureau now has pending or is presently processing 149 "project" requests -- each involving over 3,000 pages -- encompassing a total of over 900,000 pages.[1] Unfortunately, this is one growth industry in which we have few economies of scale. Processing records for FOIA disclosure is a highly labor-intensive activity. It begins with the search for responsive documents, often through many sets of files. Then, after consultations with program personnel familiar with the sensitivity of the records, the FOIA analyst conducts a line-by-line, page-by-page review, making excisions where necessary. It requires the utmost care, whether the subject of the records is national security, law enforcement, trade secrets or personal privacy.

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[1] One well-known example of an FBI "project" case is the request by the children of atomic bomb spies Ethel and Julius Rosenberg, which encompassed approximately 450,000 pages of records. See Meeropol v. Meese, 790 F.2d 942, 949 (D.C. Cir. 1986).

My prepared statement contains a detailed discussion for the record of several aspects of the Department's activities with respect to the FOIA, including the 1986 amendments to the FOIA and their implementation. Part II summarizes the background of the FOIA, the 1974 amendments to the FOIA, and the experience of the federal government in meeting the requirements of the Act. It then addresses the genesis of the more recent reform proposals, which began during the Carter Administration and culminated in the enactment of the Freedom of Information Reform Act of 1986,[2] as well as the Department's efforts to implement the law enforcement and fee and fee waiver revisions made by the 1986 FOIA amendments.

Part III then describes the Department of Justice's numerous activities guiding the government-wide implementation of the Act in recent years. This discussion demonstrates the vast increase in the quantity and quality of the Department's FOIA guidance and training efforts since the beginning of the present Administration, when the Office of Information and Privacy was created.

But before getting into the discussion of the specific amendments to the FOIA and the Department's efforts to encourage agency compliance with its requirements, I would like to take this opportunity today to discuss some of this Administration's

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[2] Pub. L. No. 99-570, 100 Stat. 3207, 3207-48, §§ 1801-1804 (Oct. 27, 1986).

policy perspectives on the Freedom of Information Act, to provide some context concerning the important public policy issues that are embodied within it. For many years now, these basic policy issues have undergirded the public debate over the subject of FOIA reform, the background and legislative results of which I subsequently review. Part I of my testimony thus states some general themes and considerations that I believe should be borne in mind in considering the subject of the FOIA and its implementation.

I. POLICY PERSPECTIVES

When President Lyndon Johnson signed the Freedom of Information Act into law on July 4, 1966, his bill-signing statement articulated the delicate public policy balance that the FOIA was intended to strike for our Federal Government:

> A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

Since then, the FOIA has had a profound effect on the operation of the Federal Government, though not always in the areas and in the manner anticipated, and it has sometimes been seen as "out of balance" in several respects.

When it was enacted, the FOIA rode on high hopes. Journalists and scholars, public interest groups and private citizens all hailed the Act as ushering in a new era of

accountability in government. Dissatisfaction with the original provisions of the Act led to the 1974 amendments, and dissatisfaction with those changes led to the 1986 revisions. Yet, even after more than two decades of agency experience, litigation and legislative revision, it is still difficult to appraise the extent to which expectations for the FOIA have been met and whether a proper balance under the Act has been realized.

First, it must be said that there can be no quarrel with the overall goal of the Freedom of Information Act. An informed electorate is the cornerstone of a healthy democracy, and any mechanism that effectively serves this end is of great societal value. Surely all would agree that the FOIA has contributed to this end and that its worthy public policy goal has often been achieved.

Indeed, where this goal has been achieved, the acknowledged accomplishments of the Act have been well publicized. The FOIA undeniably fosters a general public perception of government openness and accountability. Certainly, FOIA disclosures have provided the basis for numerous news stories and books and much public discussion on a very broad array of important topics. In addition, it is self-evident that by making many agency records publicly available, the FOIA facilitates a kind of public oversight, discouraging unprincipled and arbitrary agency actions by virtue of the mere prospect of compelled disclosure.

At the same time, more than two decades of experience with the Act suggest that it provides these benefits at a far greater cost in other respects than was originally anticipated -- a cost which should not be ignored and which in at least some situations may be too high a price to pay.

Evaluation of the Freedom of Information Act's effectiveness often is hampered by an excessive focus on only one aspect of the "public interest" -- that is, by considering only how many documents are disclosed, how many requests are denied, and what the "batting average" is for various federal agencies or requesters.[3] Contrary to such a simplistic analysis, the overall "public interest" sought to be served by the FOIA incorporates a multiplicity of discrete, sometime conflicting, "public interests" -- each of which figures into the mix which constitutes the broadest "public interest" of good government.

In addition to the "public interest" in disclosing information for government oversight, as already mentioned, there are three other principal "public interests" that I believe to be essential to a balanced approach to, and understanding of, the Freedom of Information Act.

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[3] For the record, the Department's "batting average" is rather high. Of its substantive determinations in 1987, the Department made complete grants to 59% of the requests and partial grants to 33% of the requests, while only 8% were denied in full.

The first and most obvious such "public interest" under the FOIA is that some classes of sensitive records should not be required to be disclosed to the public at all. The FOIA, of course, provides nine express exemptions. In the case of records implicating the vital interests protected in these exemptions, those interests are preserved by withholding the records from FOIA disclosure. Thus, the FOIA expressly contemplates that a "public interest" is sometimes served by maintaining the confidentiality of agency records, in order to protect our personal privacy, for example, or to preserve the effectiveness of law enforcement investigations.

A second "public interest" is the public's interest in a smoothly operating and efficient Federal Government. Whatever disagreements there may be over particular functions of the government, there presumably is a "public interest" in maintaining the effectiveness of government operations, i.e., ensuring that a government agency is able to perform the public mission for which it was created.[4] Certainly, to the extent that government agency operations and activities are affected -- or sometimes disrupted -- by the FOIA, the "public interest" is

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[4] I note that the Chairman of this Subcommittee deserves special credit for seeking to extend the coverage of certain laws, including the FOIA, to the Congress. That would be an admirable achievement, because I suspect that it would give the Congress a much closer appreciation for the costs and burdens that result from the FOIA's implementation.

necessarily affected.[5] Of course, in many cases where the Act requires such intrusions, the value of requested information being made available to the public may weigh in favor of such an accommodation. However, as I will discuss in this testimony, there are too many situations in which that is not the case.

A third "public interest" necessarily inherent in the Freedom of Information Act is the public interest in using scarce taxpayer resources in a responsible and productive manner. This means that it is proper for the taxpayer to underwrite the cost of administering the Act only when the public directly benefits from its use. Especially in these times of budgetary restraints, the setting of such a priority for the expenditure of taxpayer funds is a matter of basic fiscal responsibility.

However, several categories of FOIA users -- for example, those who have no intent or desire to benefit the public with the information they receive -- have been able to take inappropriate advantage of its structure to serve their own private interests at the taxpayer's expense and often to the detriment of more deserving requesters who are forced to wait in line behind them before their requests are processed. Surely, far beyond the simple dollar numbers, the greater cost -- some would say waste -- is in the siphoning off of the public

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[5] In fact, some operations and activities are affected insofar as officials have become reluctant to commit their ideas to paper, fearing that these records may some time in the future be disclosed under the FOIA.

servant's time and attention from matters of legitimate public interest to the service of purely private concerns. Who would say that a prisoner seeking revenge, a company anxious to obtain a competitor's data, or even an individual who is merely curious about some esoteric topic should be given virtually unlimited license to monopolize government time and resources for purely private usages?

It is this public interest that was at the heart of then-University of Chicago Law Professor (now-United States Supreme Court Justice) Antonin Scalia's criticism of the Freedom of Information Act as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored."[6] Justice Scalia surveyed some of the Act's more glaring inequities and weaknesses before concluding:

> They are foolish extravagances only because we do not have an unlimited amount of federal money to spend, an unlimited number of agency employees to assign, an unlimited number of judges to hear and decide cases. We must, alas, set some priorities -- and unless the world is mad the usual Freedom of Information Act request should not be high on the list.[7]

His rather colorful rhetoric notwithstanding, Justice Scalia's thesis, with which I agree, is actually quite simple: Though intended to enable the public to learn more about their government, the reality is that the FOIA too often has been

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[6] Scalia, The Freedom of Information Act Has No Clothes, Regulation, Mar./Apr. 1982, at 15.

[7] Id. at 17-18.

transformed into a vehicle serving purely private interests, to the detriment of its intended public interest.

Today, a typical FOIA scenario is not, as envisioned by the Congress, the journalist who seeks information about the development of public policy which he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who it was who informed against him; the drug trafficker trying to evade the law;[8] the foreign requester seeking a benefit that our citizens cannot obtain from his country; or the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not. And as if these uses do not diverge enough from the Act's original purpose, it is the public -- the intended beneficiary of the whole scheme -- who bears nearly the entire financial burden of honoring those requests while often reaping virtually none of the benefits from them.

The 1986 FOIA amendments partially accommodated this concern by providing for the assessment of review charges for the processing of requests made for commercial purposes, while at the same time granting special fee consideration to journalists,

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[8] As the D.C. Circuit has stated, "Congress granted the scholar and the scoundrel equal rights of access to agency records." Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986), vacated on other grounds, 108 S. Ct. 2010 (1988).

scholars and those others who seek information primarily to inform the electorate. See pp. 45-46 infra.

Removing unintended subsidies for commercial requesters was manifestly a good idea. But it seems to me that other groups just as easily identifiable -- prisoners, litigants attempting to supplement civil or criminal discovery, and foreign entities -- continue to receive disproportionate benefits of the FOIA though they also are unlikely to benefit the general public with the fruits of their requests. The benefits of the FOIA should be more carefully tailored to prefer those whose requests further the laudable goal of drawing the public closer to the workings of its government for the purpose of improving its quality.

Prisoners. At the Department of Justice, for example, prisoners are the most persistent FOIA users. Their requests, appeals and litigation flood the criminal law enforcement agencies. Some individuals file hundreds of requests and dozens of lawsuits.[9] They clog the administrative system. A Drug Enforcement Administration study showed that approximately 60 percent of those who request DEA records were behind bars at the time, and half of the remainder were under investigation if not

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[9] See, e.g., Crooker v. United States Marshals Service, 641 F. Supp. 1141, 1142-43 (D.D.C. 1986) (finding that prisoner's sixty FOIA lawsuits in eight years "have been [filed] for purposes of harassment").

yet already indicted.[10] It is not difficult to imagine what it is they sought: information that would abet their efforts to learn details of an investigation so that they may thwart it, or that would identify government informants or agents. All too often in such criminal enforcement contexts, there is the related cost that valuable investigators in the field will have to be pulled off the case temporarily to advise on the FOIA response. Each time this is done, a promising lead may vanish, an additional drug shipment may be delivered undetected or at very least, an agent's attention to a case will be diverted. It takes little imagination to realize how this dissipation of limited law enforcement resources can be accomplished on a systematic basis by particularly sophisticated requesters, such as those in organized crime, or by particularly persistent requesters.[11]

Foreign requesters. The FOIA gives the same rights to foreigners as to United States citizens -- even permitting lawsuits in our courts. For example, a Canadian news service which reports to its Canadian readership has not only been held

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[10] Freedom of Information Act: Hearings before the Subcomm. on the Constitution, Senate Comm. on the Judiciary, on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751, 97th Cong., 1st Sess. [hereinafter "1981 Senate Hearings"], Vol. 1, at 1052 (1981) (DEA report entitled "The Effect of the Freedom of Information Act on DEA Investigations").

[11] As expressed by a rather exasperated Circuit Court Judge Richard A. Posner of the Seventh Circuit Court of Appeals, in the context of a $39.20 FOIA fee waiver suit, "How much more money shall the taxpayer be forced to spend to relieve the monotony of [the plaintiff's] incarceration?" Savage v. CIA, 826 F.2d 561, 563 (7th Cir. 1987).

to qualify as a "media representative," but also to qualify for a fee waiver for the dissemination of the requested information in Canada.[12] Yet Canada, as well as other countries, provides no such reciprocal access to our citizens -- let alone at any discount -- under their public information laws. Even the Ayatollah Khomeini can invoke the benefits of the FOIA; his government filed a FOIA request in 1981 seeking access to CIA information on the then-exiled Shah of Iran. And as if that were not enough, even under the 1986 FOIA amendments the CIA would not have been able to charge processing costs for the time required to review the responsive records.

Civil Discovery. Another large and troublesome group of requesters consists of those who use the Act to short-circuit the rules of civil discovery, often in cases involving the government. Indeed, for the knowledgeable attorney the FOIA can be a gold mine which yields access to a variety of types of information essential to the litigant's efforts. Agencies uniformly acknowledge that a substantial percentage of the requests they receive are directly related to ongoing litigation discovery. The Defense Department has reported that half of the FOIA requests it receives come from business interests wishing to supplement formal discovery in defense contract litigation.[13]

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[12] Southam News v. INS, 674 F. Supp. 881, 892-93 (D.D.C. 1987).

[13] Ehlke & Relyea, Congress' Look at FOIA Changes Stirs Controversy, Legal Times, Jan. 3, 1983, at 11.

The Food and Drug Administration, Securities Exchange Commission and Federal Communications Commission have reported similar experiences.[14] The Department's Land and Natural Resources Division advises that requests this year are being filed at rate almost twice that of last year; the vast majority are from targets of the government's environmental investigations or from those preparing to litigate with those targets.

Despite the United States Supreme Court's repeated admonitions that "[t]he primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery,"[15] private litigants can and all too frequently do avail themselves of the Act to pursue their own economic interests.[16]

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[14] Koch & Rubin, A Proposal for a Comprehensive Restructuring of the Public Information System, 1979 Duke L.J. 1, 17-19.

[15] Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); see also United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984) ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented [by a FOIA request]."); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (the FOIA was "not intended to function as a private discovery tool"); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) ("The [Freedom of Information] Act is fundamentally designed to inform the public about agency action and not to benefit private litigants."); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) ("Discovery for litigation purposes is not an expressly indicated purpose of the [FOIA]."). Similarly, it has been noted that the FOIA was not "intended to serve as a substitute for criminal discovery." United States v. United States Dist. Court, 717 F.2d 478, 481 (9th Cir. 1983).

[16] However, the mere fact that a party is in litigation will have no effect on the merits of the party's FOIA request. See NLRB v. Sears, Roebuck & Co., 421 U.S. at 143 n.10

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Increasingly, legal newspapers, newsletters and looseleaf services which report on the FOIA offer matter-of-fact advice on how lawyers can manipulate the Act for the commercial benefit of their private clients. For example, one author recently published very specific instructions and advice encouraging readers to use the FOIA to secure government documents to facilitate private litigation against both competitors and the government alike, maintaining that it will "increase your and your clients's chances in litigation."[17] That advice included a comprehensive review of the advantages of using the FOIA as a supplement to civil discovery and counseled attorneys to file administrative appeals from agency denials of all FOIA requests and, "If still denied, file suit."

From the requester's viewpoint, whether litigation has been initiated or is only contemplated, there are distinct advantages to using the FOIA to supplement formal discovery. First and foremost is that the FOIA provides a mechanism for obtaining the release of agency records prior to the filing of a

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[16](...continued)
(requesting party's rights under FOIA "are neither increased nor decreased by reason of the fact that it claims an interest in [requested information] greater than that shared by the average member of the public"); see also Columbia Packing Co. v. Department of Agriculture, 563 F.2d 495, 500 (1st Cir. 1977); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1134-35 (4th Cir. 1977).

[17] Gay, Litigator's Guide to Using Governmental Sources and the Freedom of Information Act, The Brief 52, 55 (Fall 1985).

lawsuit. Thus, law firms and potential litigants can maintain their own files of agency records and have a head start on the agency if litigation does occur. That one-way transfer of information also may give the requester a substantial advantage in any settlement negotiations which might occur prior to litigation. The agency's attorneys are required to lay their cards face-up on the table while their opponents may play their hands close to the vest. There is also the risk that over-broad FOIA requests can be used to distract and disrupt preparation of the government's case by forcing the government to "divert its attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records."[18]

Business requesters. Unfortunately, agencies all too often are required to devote substantial FOIA staff resources to the processing of requests from business entities which seek information solely for the purpose of gaining a commercial advantage over a competitor. These requesters, usually with no pretext of benefiting the public whatsoever, often vigorously

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[18] Tomlinson, Use of the Freedom of Information Act for Discovery Purposes, 43 Md. L. Rev. 119, 128 (1984). As examples of the type of burden that may be placed upon an agency as a party seeks to use the FOIA to circumvent civil discovery, see, e.g., Carter v. Department of Commerce, Civil No. 85-0975, slip op. at 2 (D.D.C. July 23, 1986) (FOIA request regarding agency disciplinary proceeding resulted in release of 15,000 pages of records covering all such proceedings for past 15 years); Brinderson Constructors, Inc. v. Corps of Engineers, Civil No. 85-0905, slip op. at 5 (D.D.C. June 11, 1986) (FOIA request stemming from contract litigation resulted in over 100,000 pages of records being made available).

pursue the "potential windfall for competitors to whom valuable information is released under the FOIA."[19] Two rather typical recent examples include an aircraft spare parts manufacturer seeking its competitor's "commercially valuable" technical design drawings "without having to pay for them"[20] and the attorney for a hydraulic turbine manufacturer seeking its competitor's technical and pricing proposals which would permit it to "easily estimate and undercut [its competitor's] bids, thereby causing harm to the corporation's competitive position."[21] In addition to the drain on scarce FOIA personnel resources caused by the processing of such requests, such potential windfalls "could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government."[22]

Another example of a commercial use of the FOIA for purposes not in the public interest is the recently decided case of Tax Analysts, Inc. v. Department of Justice.[23] There, a commercial tax reporting service requested copies, on a weekly basis, of all federal district court tax opinions from the

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19 Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 51 (D.C. Cir. 1981).

20 Pacific Sky Supply, Inc. v. Department of the Air Force, Civil No. 86-2044, slip op. at 9-10 (D.D.C. Sept. 29, 1987).

21 Landfair v. Department of the Army, 645 F. Supp. 325, 329 (D.D.C. 1986).

22 Worthington Compressors, Inc. v. Costle, 662 F.2d at 51.

23 845 F.2d 1060 (D.C. Cir. 1988), reh'g en banc denied, No. 86-5625 (D.C. Cir. July 15, 1988).

Department's Tax Division, because the company did not want to expend the resources to go to the various district courts around the country to acquire a copy of the opinions, as did its competitor tax services. The District of Columbia Circuit rejected the Department's defenses, though it did admit that securing "already publicly available material for a commercial publication is certainly not a commonly perceived purpose of the FOIA."[24] While the Court acknowledged that the Department could charge its statutory fees for search and duplication (which for search fees alone were estimated to be nearly $75,000 per year), it suggested that the agency could minimize this cost by creating a special file whereby a copy of each tax opinion would be deposited and held for the company as it arrived at the Justice Department's Tax Division.

In this case, the FOIA serves only to save one company the expense required of its competitors to compile publicly available sources for inclusion in its publication, with much of its direct costs being shouldered by the American taxpayers.

This case, further, has disturbing implications for all federal agencies, with the potential for imposing massive financial and administrative burdens on federal agencies to serve as public "storehouses" of information. For example, the Department of Justice could be required to establish a "national

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[24] 845 F.2d at 1066.

court library" whose holdings would be subject to the FOIA.[25] Similarly, the Environmental Protection Agency could be required to establish a specialized library of all court cases relating to our natural resources. Mr. Chairman, the Congress created the National Archives, the Library of Congress, and the federal depository library system for such purposes. Other federal agencies should not be pressed into service as libraries for materials publicly available elsewhere.

These kinds of experiences show the FOIA to be imposing significant costs, both in budgetary outlays and in its dysfunctional impact upon agency effectiveness. The direct costs of federal agency compliance with the FOIA to process the nearly 350,000 requests for records received each year through the administrative appeal stage now exceed $70 million.[26] Some

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[25] In 1987, a total of 797,648 cases were terminated in the federal circuit, district and bankruptcy courts, and the United States was a party to 115,314 cases begun in the district courts. Annual Report of the Director of the Administrative Office of the United States Courts, 1987, pp. 1-9.

[26] The most recent authoritative analysis of the costs of the Freedom of Information Act was conducted in 1983. Using even the admittedly incomplete data collected in 1981, the General Accounting Office counted up more than $61 million in annual FOIA costs. Government Accounting Office Report GAO/GGD-83-71 (June 22, 1983). Surely, the study would have reflected far greater costs to the government if it would have been able to accurately capture figures understated or not at all included. Such items would include realistic litigation costs from the agency General Counsels, from the United States Attorneys, from the Justice Department's Civil and Tax Divisions, and from the agencies with their own litigation authority. They would also include the costs to the district and appellate courts. And, most significantly, they would have to include the cost of consultations with and reviews by non-FOIA program staff personnel.

commentators have even estimated that the real cost of the FOIA may be as high as $250 million annually.[27] The demands of FOIA processing also siphon valuable personnel resources away from the agencies' primary missions. Litigation of cases arising from the denial of FOIA requests further burdens the agencies as well as the federal courts, prompting this incredulous reaction from one district court judge:

> It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which [the Freedom of Information Act] process necessarily entails.[28]

Unfortunately, specific figures are impossible to establish because of disparate agency accounting and statistical methods. Time and resources spent on FOIA matters by agency staff who are not part of an agency FOIA unit often are not identified specifically as a FOIA expense. In many cases the professional FOIA staff must consult with non-FOIA staff personnel, i.e., senior agency executives, contracting officers, program or area specialists, in order to determine the applicability of various exemptions. Thus, agency personnel who either created or worked on a document may have to review that document during both the initial request and administrative appeal stages, as well as possibly during any subsequent litigation. Similarly, agency personnel may be required to

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[27] See Grunewald, Freedom of Information Dispute Resolution, 40 Admin. L. Rev. 1, 21 (1988).

[28] Agee v. CIA, 517 F. Supp. 1335, 1341-42 (D.D.C. 1981) (Gesell, J.).

review documents created by predecessors. These review efforts require intensive professional staff time, all at the expense of the staffers' primary duties. Most agencies have no means of allocating these costs to the FOIA portions of their budgets, assuming that such a portion even exists. Nor is there a way to quantify the loss of efficiency of agency staff distracted by FOIA duties from accomplishing primary agency functions.[29]

While the Department does not routinely compile data by requester category, the requests from those who do not benefit the public with the fruits of their requests -- the prisoners, the foreign parties, the commercial requesters and those seeking to shortcut established civil and criminal discovery procedures -- constitute a large proportion, probably approaching one half, of our total requests. These requesters threaten the balance of interests at the heart of the Freedom of Information Act. The public subsidizes the processing of their requests, but itself reaps no gain from their disclosures and, indeed, may suffer significant detriment from such disclosures. Equally as important, those requesters who are likely to benefit the public with the information disclosed -- the journalists, historians, public interest groups and concerned citizens -- have to wait in

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[29] Likewise, there are no empirical analyses purporting to quantify the costs of FOIA litigation to the judiciary. However, based on a rough figure of $7,200 per case, which seems unrealistically low, it has been estimated that FOIA litigation costs the federal courts approximately $3.6 million per year in adjudicative and administrative costs. Grunewald, supra, at 24-25.

line while the requests of the unintended beneficiaries, which have overloaded the administrative system, are satisfied.

For these reasons, Mr. Chairman, our policy perspective is that the Act's proper balance of interests in some respects is askew. The FOIA's original purpose -- that of informing the public about the activities of the Federal Government in order to better inform the electorate -- is increasingly being crowded out by other uses that do not serve the public interest. With the single recent exception of commercial requesters, the taxpayers are required to shoulder the bulk of the costs expended in providing these individualized user services. These considerations, of which federal agencies on a daily basis are only too painfully aware, necessarily shape this Administration's perspective on the Freedom of Information Act. Such considerations ought to be taken into account, Mr. Chairman, in any assessment of the Act's overall cost and effectiveness. A balanced consideration of the Freedom of Information Act requires that the multiplicity of "public interests" be considered. The undeniable public interest in the disclosure of records for government oversight must be balanced against the equally legitimate public interests in preserving the confidentiality of certain records, in maintaining the efficient operation of government, in promoting fiscal responsibility, in protecting the integrity of the law enforcement process, and in minimizing the employment of the FOIA in a way which serves only private interests.

II. LEGISLATIVE REFORM EFFORTS

Indeed, since the outset, the major challenge presented under the Freedom of Information Act has been to achieve a proper balance between the important public policy interests that are counterpoised within it -- to best accommodate and reconcile these necessarily conflicting interests in both statutory terms and sound implementation policy.

A. Historical Background

The effort to strive for this balance began with the Freedom of Information Act's enactment in 1966. In enacting the FOIA, the Congress established an unprecedented mechanism for public access to the records of the Federal Executive Branch, completely reversing the pre-existing legal presumption under Section 2 of the Administrative Procedure Act that federal agency records would not be made publicly available unless good cause for their disclosure was shown.[30] Under the FOIA, for the first time, any member of the public -- "any person" -- could

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[30] Section 2 of the APA, 5 U.S.C. § 1002 (1964), the public disclosure section, afforded federal agencies such broad discretion to deny access requests that it had come to be looked upon by many as more a withholding statute than a disclosure mechanism. See S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

request access to any federal agency record, without having to state a reason for seeking such disclosure.[31]

In establishing this unprecedented disclosure mechanism, the Congress specifically provided nine exemptions designed to preserve legitimate governmental interests in the face of this new general disclosure policy, to introduce some measure of balance into the Act as it were. For example, Exemption 7 as originally enacted categorically protected all "investigatory files" from compelled FOIA disclosure -- largely exempting federal law enforcement agencies from the ambit of the Act. The 1966 Act also afforded agencies much of the broad procedural latitude that they had enjoyed previously. Thus, during the early years of the FOIA's existence, as federal agencies adapted to its basic new public policy of compelled information disclosure, the impact of the Act was relatively limited by its design.

With the passage of time, though, perhaps inevitably, members of the public and groups most interested in information disclosure began to voice the view that the FOIA, in the form in which it was enacted, was too heavily weighted against disclosure in some substantive and procedural respects. It was suggested that the balance sought to be achieved through the FOIA had not

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[31] As discussed at pp. 12-13 supra, the Act grants foreigners the same rights as American citizens, so that even the Ayatollah Khomeini was able to make a FOIA request for CIA records in 1981 pertaining to the exiled Shah of Iran.

been achieved under its original enactment and that the Act required major adjustments in order to make it a more viable mechanism of government information disclosure.

Consequently, and with the added strong impetus of the extraordinary public policy concerns arising from the "Watergate affair," the Congress in 1974 substantially broadened the disclosure obligations of the Act through a series of statutory modifications, both substantive and procedural. Generally speaking, the 1974 amendments made it easier for FOIA requesters to make requests and to challenge agency nondisclosure decisions in court. They also greatly increased the burden to be met by the government in properly withholding sensitive records or record portions, particularly as to information relating to law enforcement and national security matters. Most significantly, the protection for law enforcement files in Exemption 7 was drastically cut back by restructuring that exemption to require the determination that disclosure would cause one of six enumerated harms (subparts (A) through (F)) before an item of law enforcement information could properly be withheld.

As a result of the 1974 FOIA amendments -- which became effective in 1975 and were widely publicized as "opening up" many agency files -- the volume of activity under the Act increased enormously, at both the administrative and the litigation levels. During the ensuing years, federal agencies struggled with the ever-increasing demands that were placed upon them to process

voluminous amounts of their records, both old and new, for requested public disclosure. This was particularly so at agencies holding law enforcement responsibilities, where the volume of FOIA requests literally skyrocketed overnight; at the FBI, for example, the annual number of FOIA requests received jumped from 447 to 13,875 within one year, an increase of more than 3,000 percent.[32] Most requests required the laborious making of specific harm determinations -- page by page and line by line -- under Exemption 7's demanding new structure.

Much significant information from law enforcement files and other agency files was publicly disclosed for the first time as a result of this greatly increased FOIA activity beginning in the mid-1970s. But it was not long before those most closely familiar with FOIA operations at federal agencies had a firm basis for concluding that the 1974 FOIA amendments, in some very critical respects, had actually overcorrected the course of our national disclosure policy and that the FOIA was, once again, out of balance. For example, both foreign and local law enforcement agencies repeatedly expressed great concern over our ability to protect the sensitive information that they had provided to federal law enforcement agencies, as well as to protect the very fact of their cooperation. Similarly, our law enforcement agencies found that many of their individual confidential sources had become reluctant or unwilling to continue to cooperate.

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[32] See Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 617 n.3 (D.C. Cir. 1976).

Another problem resulting from the 1974 amendments was that in some cases the mere invocation of a law enforcement exemption -- particularly Exemption 7(A) -- served to "tip off" the requester to the fact of an ongoing investigation of him.

Corrective legislative reform of the Freedom of Information Act -- especially regarding the critical need to ensure adequate protection of the federal government's most sensitive law enforcement information -- was soon viewed as necessary by many observers. In fact, the FOIA reform movement to counterbalance certain aspects of the 1974 FOIA amendments began in the late 1970's, as agency FOIA officers developed a depth of experience in dealing with the amended Act and began to formulate specific reform proposals that could address their increasing concerns. These FOIA reform proposals were, in turn, carefully compiled by the Department of Justice in its capacity as the "lead" federal agency for FOIA matters and as the agency most heavily concerned with the critical law enforcement interests that were threatened by the FOIA in its amended form.

Based upon this active consultation with other federal agencies during 1979 and 1980, the Department put together a wide-ranging legislative package of FOIA reform proposals -- one which included strong new protections for law enforcement information among many other major substantive and procedural reforms. The final, comprehensive package of FOIA reform amendments was assembled during mid-1980 and then received

approval at the highest levels within the Justice Department for submission as a formal legislative proposal. This proposal was not introduced during the Carter Administration only because there was a change of administrations.

However, the very fact that the Carter Administration undertook such extensive FOIA reform efforts illustrates well that the subject of FOIA reform -- of striving for the best possible balance in the Act -- is fundamentally a matter of sound public policy that transcends partisan political bounds.

In 1981, at the beginning of this Administration, under the leadership of former Assistant Attorney General for Legal Policy Jonathan C. Rose, the Department made it a high priority to continue these FOIA reform efforts and to bring them to fruition. The 1980 package of FOIA amendment proposals served as a firm foundation for these renewed efforts. The Department also again surveyed a wide range of other agencies to ensure that its amendment proposals would reflect their most recent experience in administering the 1974 amendments.

These efforts all led to the Department's formal submission of a FOIA reform legislative proposal in October 1981 (S. 1751, 97th Cong.), which soon was merged with a similar proposal (S. 1730, 97th Cong.) that originated within the subcommittee then having jurisdiction, the Subcommittee on the Constitution, chaired by Senator Orrin Hatch. This merged bill,

S. 1730, was quickly marked up for full Senate Judiciary Committee consideration. The keystone of this FOIA amendment package was its law enforcement provisions, which were based upon the demonstrated concerns that the 1974 FOIA amendments had dangerously weakened the ability of federal law enforcement agencies to perform their vital missions.

In particular, former Federal Bureau of Investigation Director William H. Webster testified to the vulnerability of law enforcement agencies such as the FBI to use of the FOIA by sophisticated requesters who could analyze investigatory records released in expurgated form under the 1974 FOIA amendments for the purposes of gleaning sensitive law enforcement information.[33] Indeed, such FOIA requesters were widely known to scrutinize such records in intense efforts to discern the identities of informants; this very fact alone threatened to dry up the FBI's vital confidential source system, as increasing numbers of sources began to doubt the government's ability to protect them in the face of FOIA requests.[34]

It is noteworthy, Mr. Chairman, that the full Senate Judiciary Committee, in carefully considering the subject of FOIA reform during the early months of 1982, did so in a strongly

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[33] See 1981 Senate Hearings, Vol. 1, at 847-65, 973-88 (testimony of FBI Director Webster). See also id. at 1041-1147 (testimony regarding impact upon Drug Enforcement Administration).

[34] Id.

bipartisan spirit that unified the entire Committee behind a comprehensive set of compromise amendment proposals. As Chief Counsel of the Subcommittee at the time, I recall well that it was through your leadership, together with that of Senators Hatch and DeConcini, that the Senate Judiciary Committee unanimously approved a broad, yet carefully tailored, FOIA reform bill in May 1982. That compromise FOIA reform bill, which passed the Senate unanimously in the following Congress (S. 774, 98th Cong.), became the basis for all further consideration of FOIA reform legislation to date.

Regrettably, these FOIA reform efforts -- which enjoyed such a strong start in the Senate, consistent with their bipartisan origins -- then became stalled during the following sessions of the Congress, primarily due to the markedly different reception accorded the subject in the House of Representatives.[35]

It was not until almost the end of the 99th Congress, during congressional consideration of the Anti-Drug Abuse Act of 1986, that it became possible to achieve any measure of legislative FOIA reform. And then, because these FOIA reform amendments were adopted by the Congress as a floor amendment to the omnibus anti-drug legislation near the close of a legislative session, they were enacted without the

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[35] See FOIA Update, Winter 1984, at 1, 6; FOIA Update, Summer 1984, at 1, 4; FOIA Update, Fall 1984, at 1; FOIA Update, Spring 1986, at 1.

contemporaneous preparation of committee reports or equivalent statements of legislative consensus that ordinarily would accompany such legislation.

B. Enactment of the 1986 FOIA Amendments

The Freedom of Information Reform Act of 1986, enacted as §§ 1801-1804 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207-48 (Oct. 27, 1986), was the culmination of these longstanding FOIA reform efforts. While it was not possible to achieve the complete breadth of FOIA reform that had earlier been unanimously approved by the Senate, the 1986 FOIA amendments nevertheless constituted a major reform of the Act, counterbalancing much of the troubling effects of the 1974 FOIA amendments, particularly regarding the protection of law enforcement information.[36]

The 1986 FOIA amendments consist of two distinct parts: the law enforcement amendments, contained in § 1802, which took effect immediately upon enactment on October 27, 1986; and the fee and fee waiver amendments, contained in § 1803, which took

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[36] One particular aspect of the previous FOIA reform bills ultimately was accomplished, in part, through an executive order issued in 1987 rather than by legislation. Executive Order No. 12600, issued on June 23, 1987, required agencies to implement most of the "business submitter notification procedures" contained in S. 774 to the extent permitted by law. However, that Order could not institute the "de novo" standard of judicial review that had been sought for "reverse" FOIA lawsuits brought to enjoin disclosure of such information. See FOIA Update, Summer 1987, at 1-3.

effect only after a 180-day waiting period (ending April 25, 1987) and which required the issuance of implementing regulations to be fully effective. See Pub. L. No. 99-570, § 1804(a)-(b) (1986) (not codified).

1. The Law Enforcement Provisions of the 1986 Act

The law enforcement part of the 1986 FOIA amendments provided comprehensive new protection for the records of federal law enforcement agencies. These amendments consist of a series of statutory language modifications made throughout the Act's major law enforcement exemption, Exemption 7, plus three entirely new provisions in a new subsection (c) that establish special exclusions for the records of particularly sensitive law enforcement files.

The revisions to Exemption 7 made by the 1986 FOIA amendments are virtually identical to the law enforcement amendments first approved in the Senate several years earlier.[37] While preserving the basic structure of Exemption 7 established in 1974, these amendments addressed the concerns of law enforcement agencies by correcting its evident shortcomings. Both individually and collectively, they strengthen this critical

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[37] The only difference between the two is the immaterial substitution of the word "individual" in place of the words "natural person" at the end of Exemption 7(F). Compare 5 U.S.C. § 552(b)(7), as amended by Pub. L. No. 99-570, § 1802 (1986), with S. Rep. No. 221, 98th Cong., 1st Sess. 45-46 (1983) (containing pertinent portion of S. 774).

exemption by broadening its applicability to law enforcement information.

First, the 1986 FOIA amendments substantially eased the threshold requirement of Exemption 7, which previously required that the records in question must be "investigatory records compiled for law enforcement purposes" in order for any of the six subparts of Exemption 7 even to apply. For example, law enforcement manuals formerly were held ineligible for Exemption 7 protection merely because they were not "investigatory" in character.[38] The 1986 amendments deleted the word "investigatory," and also made the exemption applicable to "information" as well as "records." As now formulated, the Exemption 7 threshold of "records or information compiled for law enforcement purposes" no longer would disqualify sensitive law enforcement information from receiving otherwise-applicable protection.

Second, the 1986 amendments made a fundamental change in Exemption 7 by reducing the agency's burden in establishing the risk of harm threatened by a requested disclosure. Previously, in order to withhold information under any of the exemption's six subparts, an agency was required to determine (and to show in court, if sued) that the disclosure "would" cause the particular law enforcement harm in question.

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38 See, e.g., Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979) (holding Exemption 7 inapplicable to DEA manual because it "was not compiled in the course of a specific investigation").

As amended, Exemption 7 now requires a finding only that disclosure "could reasonably be expected to" cause the harm in question under its major subsections: Exemption 7(A) (ongoing investigations and enforcement proceedings); Exemption 7(C) (personal privacy); Exemption 7(D) (confidential sources); and Exemption 7(F) (life and physical safety).[39] Law enforcement agencies thus have greater latitude in safeguarding against the harms implicated in these exemptions, consistent with the "mosaic" principle of information analysis and protection.[40]

Third, the 1986 FOIA amendments also specifically broadened the protective scopes of several of Exemption 7's subparts. Exemption 7(D), as amended, now specifically protects nonfederal governmental entities and private institutions that confidentially share law enforcement information with federal agencies, thus ensuring that this vital system of confidentiality can be preserved. Similarly, the language of Exemption 7(D) was reworded to make clear that it protects all information furnished

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[39] 5 U.S.C. § 552(b)(7)(A), (C), (D), (F), as amended by Pub. L. No. 99-570, § 1802 (1986).

[40] The "mosaic" principle recognizes that, as one court has phrased it, a seemingly innocuous bit of information, "much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980).

by a confidential source in connection with a criminal or lawful national security investigation.[41]

Fourth, the 1986 FOIA amendments completely revised Exemption 7(E), which previously protected only certain investigative law enforcement techniques and procedures. As revised, it now encompasses all law enforcement information the release of which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[42] Finally, Exemption 7(F) was broadened to permit the withholding of any law enforcement information the disclosure of which could threaten the life or physical safety of anyone, not just law enforcement officials as under previous law.[43]

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[41] Such complete protection under Exemption 7(D) is particularly important because any seemingly innocuous information provided by an informant could, potentially, identify him as such to a knowledgeable FOIA requester. FBI Director Webster described a classic example in which the mere mention of the phrase "green sedan" held such significance because, when released in context of a particular record and analyzed by a requester knowledgeable about the surrounding circumstances, it could identify an informant. See 1981 Senate Hearings, Vol. 1, at 856-57.

[42] 5 U.S.C. § 552(b)(7)(E), as amended by Pub. L. No. 99-570, § 1802 (1986).

[43] See 5 U.S.C. § 552(b)(7)(F), as amended by Pub. L. No. 99-570, § 1802 (1986).

Beyond these measures strengthening Exemption 7, the 1986 FOIA amendments also established an entirely new form of protection -- the record "exclusion" -- for the records of certain especially sensitive law enforcement matters. The Congress took this special step recognizing the fact that in some situations an agency simply cannot adequately protect its law enforcement interests through the use of mere exemption protection, because the very invocation of a particular exemption tells a requester the sometimes sensitive fact that a certain law enforcement activity exists. New subsection (c) of the Act permits law enforcement agencies to "exclude" three categories of law enforcement records -- that is, to treat them, under narrowly specified circumstances, as simply not subject to the Act's requirements at all.

Under the "(c)(1) exclusion," federal law enforcement agencies now may exclude entirely from the Act's reach the records of its ongoing criminal investigations -- records that ordinarily would be withheld in their entireties under Exemption 7(A) anyway -- whenever an investigation's subject is unaware of its pendency and would receive a harmful "tipoff" to that fact if the agency were to specify Exemption 7(A) as the basis for its withholding of records. FBI Director Webster had testified that organized crime groups, for example, have been known to use the FOIA in attempts to learn whether certain of their activities have yet come under investigation.[44] Through this new exclusion,

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[44] See 1981 Senate Hearings, Vol. 1, at 853-54, 977-80.

agencies conducting sensitive criminal investigations, when pressed with carefully targeted FOIA requests, can avoid having to "tip off" investigative subjects to whether or not they are under investigation.

The "(c)(2) exclusion" is designed to cover the less common, but extremely perilous, situation in which a criminal organization attempts to use the FOIA to ferret out the identity of a confidential source or informant. It permits a criminal law enforcement agency to protect the identities of its informants and to preserve the integrity of Exemption 7(D) -- just as the (c)(1) exclusion preserves the integrity of Exemption 7(A) -- in those circumstances where the very invocation of Exemption 7(D) to withhold records on a named individual would be tantamount to identifying the individual as a confidential source.[45]

Finally, the "(c)(3) exclusion" provides special protection for certain national security-related records of the Federal Bureau of Investigation. Recognizing the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence and the battle against international terrorism -- as well as the fact that the classified records of these activities can be particularly

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[45] See 1981 Senate Hearings, Vol. 1, at 978.

vulnerable to targeted FOIA requests[46] -- this exclusion authorizes the FBI to treat such records as not subject to the Act whenever the very existence of the records itself (and not just the information contained in them) is a classified fact.

2. Implementation of the 1986 Law Enforcement Amendments

The Department of Justice has taken a number of steps to implement these law enforcement amendments. As noted above, these amendments became effective on the date of their enactment (October 27, 1986), and also applied to any FOIA request or FOIA lawsuit pending on that date. See Pub. L. No. 99-570, § 1804(a) (not codified).

The Department's Office of Information and Privacy ("OIP") immediately notified all FOIA personnel in the federal government of this legislative development through its government-wide FOIA policy publication, FOIA Update, which described all of the FOIA reform amendments. See FOIA Update, Fall 1986, at 1-2. That issue also included a copy of the Act in its amended form, showing the exact changes made by the 1986 FOIA amendments. See id. at 3-6.

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[46] FBI Director Webster specifically testified to this vulnerability and to the fact that, in some such situations, "even acknowledging the absence of information in our files can be damaging." See 1981 Senate Hearings, Vol. 1, at 848. See also id. at 973 (referring to such testimony taken in executive session).

Additionally, OIP specifically contacted the various law enforcement components of the Department of Justice, as well as those of the other major law federal agencies holding law enforcement responsibilities, to ensure that they were alert to the Act's new law enforcement provisions and understood their current applicability. Such contacts were also made through the Justice Department's Civil Division and Executive Office for United States Attorneys -- and with the few major federal regulatory agencies (the SEC, the NLRB, and the EEOC) that defend their own FOIA actions in court -- to ensure that the amendments would properly be taken into consideration in all pending FOIA litigation. In all such contacts, agency personnel were encouraged to bring to the Department's attention any question that might arise about the law enforcement amendments.

The Department also immediately began preparations to hold a special training session for federal law enforcement agencies, which would focus exclusively on the new law enforcement amendments. See FOIA Update, Fall 1986, at 8. The "Special FOIA Seminar for Law Enforcement Agencies" was conducted on February 4, 1987, and was attended by more than 300 representatives from virtually all federal agencies holding law enforcement responsibilities. This unprecedented, full-day session covered all aspects of the law enforcement provisions of the 1986 FOIA amendments, and it also served as a forum for the discussion of law enforcement issues arising under the Act. Particular attention was paid to the Act's new exclusion

provisions and to the need for especially careful handling of any possible exclusion situation; all agencies were advised not to apply these new provisions without first consulting the Department's Office of Information and Privacy.

Subsequently, the Justice Department issued the "Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act" (December 1987), its most significant step to guide the implementation of the Act's new law enforcement provisions.[47] This publication is designed to serve as the principal reference guide to the 1986 FOIA amendments, containing all pertinent implementation guidance under a single cover.[48] It continues the longstanding tradition of issuing such Attorney General's memoranda to guide the implementation of the Act and its major amendments. The Attorney General issued such a

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[47] Much of this implementation guidance previously was provided in a more abbreviated form in the "Justice Department Guide to the Freedom of Information Act," which was published as part of the 1987 Freedom of Information Case List. The revised 1987 "Guide" included discussions of the Exemption 7 amendments and a new section addressing the exclusion provisions. See id. at 386-413, 414-20.

[48] Copies of this publication have been widely distributed by the Department to FOIA personnel throughout the Federal Government -- including through JURIS, the Department's automated legal research system -- as well as to interested congressional offices. Additionally, the Government Printing Office printed several thousand copies for sale to the public at the nominal price of $2.00 per copy and has disseminated copies to federal depository libraries nationwide.

memorandum upon the FOIA's original enactment[49] and again to guide the implementation of the 1974 FOIA amendments.[50]

This publication contains a detailed, 30-page analysis of the various law enforcement amendments made in 1986, including an introductory discussion of the history of the 1986 FOIA amendments overall.[51] The memorandum notes that there is only limited and conflicting legislative history underlying the 1986 amendments, but observes that the earlier committee report prepared by the Senate Judiciary Committee on virtually the identical Exemption 7 amendments can be consulted authoritatively as to those amendments.[52] Beyond that, the memorandum analyzes the amendments according to their clear statutory terms and evident plain meaning.

Parts B through F of the memorandum discuss each of the Exemption 7 language modifications made by the 1986 FOIA

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[49] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967).

[50] Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Feb. 1975).

[51] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), Part A.

[52] This committee report, Senate Report No. 98-221, was formally issued by the Senate Judiciary Committee during the 98th Congress when the Senate unanimously passed S. 774, the major predecessor FOIA reform bill to the Freedom of Information Reform Act of 1986. In addition to containing Exemption 7 amendments virtually identical to those ultimately enacted, that predecessor bill also contained a provision substantially the same as the enacted (c)(2) exclusion. See S. Rep. No. 221, 98th Cong., 1st Sess. 44 (1983); see also id. at 25.

amendments, with reference made wherever applicable to the early court decisions that consider the effects of the modifications. The memorandum thus gives federal agencies the best available guidance on the meaning and proper implementation of these amendments.

Of particularly great importance is the guidance given regarding the Act's new exclusion provisions, whereby certain law enforcement records can be treated as not subject to the Act at all. Each of these three new exclusions is discussed in detail in Parts G.1, G.2 and G.3 of the memorandum, with special emphasis on the specific circumstances that must be found to currently exist before each exclusion can properly be employed. Where the statute's special exclusion requirements and temporal limitations are not fully met, the memorandum stresses, the use or continued use of an exclusion simply is not warranted.[53]

The memorandum also explicitly recognizes the novelty of these new exclusions; a sound understanding of the fundamental nature of a record exclusion -- as opposed to the more familiar FOIA exemption -- is absolutely essential to its proper implementation. Thus, Part G.4 of the memorandum addresses the exact nature and operation of the exclusion mechanism, carefully distinguishing its use from the invocation

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53 See, e.g., Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), at 21-22, 24 n.43, 25 n.46.

of a FOIA exemption -- and especially from the application of what is known as the "Glomarization" principle, by which an agency may simply refuse to confirm or deny the existence of any record responsive to a FOIA request on the basis of a specified FOIA exemption.[54] The exclusion technique affords a higher level of protection than even "Glomarization" -- because when properly employed in exceptional situations, it leaves the requester without any signal whatsoever as to the possible existence of records responsive to a specially targeted FOIA request.

Likewise, because of the extraordinary and unfamiliar nature of the new exclusion mechanism, the memorandum further addresses the foreseeable procedural considerations surrounding its implementation, including the special procedural aspects of handling exclusion matters both administratively and in court.[55]

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[54] The courts first recognized this principle in Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976), where the CIA, on national security grounds under FOIA Exemption 1, refused to confirm or deny the existence of certain records pertaining to the Glomar Explorer submarine-retrieval ship. Consequently, this "neither confirm nor deny" defense under the FOIA has come to be known colloquially by the term "Glomarization," see FOIA Update, Spring 1983, at 5, and it has been applied in connection with other specified exemptions as well, see FOIA Update, Spring 1986, at 2 (Exemption 6); FOIA Update, Winter 1986, at 3-4 (Exemption 7(C)).

[55] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), Part G.5. For example, special care is required at every stage of the administrative process to ensure that the agency's actions do not undermine the integrity of an exclusion action being taken (e.g., by inadvertently signalling to a requester that records are being excluded). See, e.g., id. at 28 n.49, 29 n.52. By the same token, agencies must ensure the proper maintenance of all excluded records, against the possibility that they will at some

(continued...)

The memorandum sets forth a comprehensive litigation policy for the handling of possible cases in which exclusion issues arise, including those in which the requester alleges that records have been excluded but that is not in fact the case.[56] The Department's policy is to do everything it reasonably can to handle this special exclusion authority in the most responsible manner possible.[57]

Finally, the memorandum specifically cautions all federal law enforcement agencies to treat these special new exclusions with the utmost care and to consider their possible applicability only in close consultation with the Justice Department, on a case-by-case basis.[58]

Appended to the "Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act" are copies of the policy guidance statements of the Office of Management and Budget and the Department of Justice on the new fee and fee waiver provisions of the 1986 FOIA amendments, respectively, which are discussed below. Also included was a copy of the Act

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[55](...continued)
point be required to be processed under the usual standards should the exclusion cease to apply. See id. at 28 n.51.

[56] See id. at 29-30.

[57] See, e.g., id. at 30 n.53.

[58] See id. at 27 n.48.

in its amended form, with interlineations showing the exact statutory modifications made.

3. The Fee and Fee Waiver Provisions of the 1986 Act

The second part of the 1986 FOIA amendments completely revised the statutory provisions governing the charging of fees to requesters for the expenses incurred by agencies in the handling of their FOIA requests, and the granting of fee waivers for requests found to be made in the public interest.

First, the amendments established an entirely new statutory fee structure, in subsection (a)(4)(A) of the Act, which now governs the making of fee determinations. Under this new fee structure, agencies not only can charge requesters for the costs of searching for and duplicating requested records, as under previous law, they also can charge certain requesters for the costs of reviewing the records for purposes of making disclosure determinations.[59] This new structure, however, distinguishes among three basic classes of FOIA requesters and limits the fees that can be assessed against them accordingly.

Under these provisions, all requesters who seek information for a "commercial use" now can be assessed the new record review fees as well as the usual costs of record search

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[59] See 5 U.S.C. § 552(a)(4)(A)(ii), (iv), as enacted by Pub. L. No. 99-570, § 1803 (1986).

and duplication.[60] The ordinary FOIA requester, on the other hand, cannot be assessed such review fees but continues to be assessed fees for record search and duplication, as under prior law, except that certain minimum fee amounts may no longer be assessed.[61]

The fee provisions also created a third class of FOIA requesters: those requesters who seek information not for a "commercial use" and who are determined to be an "educational institution," a "noncommercial scientific institution," or a "representative of the news media."[62] Such requesters have the benefit of a specific fee limitation under the amended Act excluding them from the assessment of search fees. This is a categorical entitlement, one based solely upon the identity and nature of the requester, not upon the contents of the particular records sought.

In addition to these basic fee and fee-limitation provisions, the 1986 FOIA amendments also revised the Act's

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[60] 5 U.S.C. § 552(a)(4)(A)(ii)(I), as enacted by Pub. L. No. 99-570, § 1803 (1986).

[61] Noncommercial requesters no longer may be assessed fees "for the first two hours of search time or for the first one hundred pages of duplication," and a requester cannot be required to pay any fee that does not exceed an agency's "costs of routine collection and processing" of it. 5 U.S.C. § 552(a)(4)(A)(iv)(I), (II), as enacted by Pub. L. No. 99-570, § 1803 (1986).

[62] 5 U.S.C. § 552(a)(4)(A)(ii)(II), as enacted by Pub. L. No. 99-570, § 1803 (1986).

statutory standard governing the general waiver or reduction of fees on the basis of the "public interest" -- commonly referred to by the term "fee waiver."[63] All FOIA requesters are entitled to seek such a general waiver of the fees applicable to them, on the basis that the agency's disclosure of the particular records sought, to that requester, would be "in the public interest."[64]

This revised statutory "public interest" standard now more specifically defines that term than did the previous law: It provides for the waiver or reduction of fees wherever it is determined that disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[65]

Finally, as a procedural matter, the 1986 FOIA amendments for the first time required that all federal agencies promulgate individual agency regulations setting forth both

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[63] It is important to distinguish between such "public interest" FOIA fee waivers, on the one hand, and the new FOIA fee limitations that are provided for educational, scientific and news media requesters under the amended Act, on the other. The latter fee limitation is applicable categorically to such types of requesters but pertains only to search fees.

[64] 5 U.S.C. § 552(a)(4)(A)(iii), as enacted by Pub. L. No. 99-570, § 1803 (1986).

[65] Id. The 1986 FOIA amendments also altered the standard of judicial review for the adjudication of fee waiver issues in court, specifying that such issues shall be reviewed de novo, but that the scope of review is limited to the administrative record prepared before the agency. 5 U.S.C. § 552(a)(4)(A)(vii), as enacted by Pub. L. No. 99-570, § 1803 (1986).

specific schedules of FOIA fees and also their procedures and standards for making fee waiver determinations.[66] Each agency's fee schedule must conform to uniform fee guidelines promulgated by the Office of Management and Budget ("OMB"). Thus, the amendments shifted to OMB the government-wide FOIA guidance responsibility regarding matters of FOIA fees, without affecting the Department of Justice's policy responsibility regarding FOIA fee waivers as well as all other issues arising under the FOIA.

4. Implementation of the Revised Fee Provisions

The implementation of the new fee provisions of the 1986 FOIA amendments proceeded in multiple steps, first at OMB and then at the individual agencies. Before long, the 180-day implementation period for these amendments proved to be highly unrealistic. Under the amendments, the preparation of each agency's implementing regulations had to await the issuance of the uniform fee guidelines by OMB. OMB's Office of Information and Regulatory Affairs moved as expeditiously as possible to prepare such government-wide fee guidelines and publish them for the required public notice and comment but, because of the complexity of this process, and that of the subject matter involved, OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines were not published until March 27, 1987 (52 Fed. Reg. 10011). That was only 30 days before the end of the

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[66] See 5 U.S.C. § 552(a)(4)(A)(i), as enacted by Pub. L. No. 99-570, § 1803 (1986).

statutory 180-day implementation period, so federal agencies were unable to prepare their new fee regulations and have them in place in time. Each set of individual agency regulations had to proceed through the same notice-and-comment process, which required that they could not take effect until 30 days after publication in final form.[67]

This process took most federal agencies well beyond the effective date of the fee amendments, leaving them in an extraordinary "interim period" between that date and the date upon which their regulations took final effect,[68] and the Department of Justice assisted OMB and other agencies regarding the novel concerns that were presented. Consistent with the Act's specific implementation provision for fee matters,[69] the Department afforded all FOIA requesters the maximum benefits of both the old and the new fee provisions during this "interim period." Further, on behalf of OMB, the Department formally communicated this same implementation policy to all federal agencies through FOIA Update (Winter/Spring 1987, at 1-2),

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[67] OMB specifically determined that this 30-day waiting period under 5 U.S.C. § 553(d) would be applicable to all implementing fee regulations issued by individual agencies.

[68] For example, the Department of Justice's implementing fee regulations were published in final form on September 2, 1987, 52 Fed. Reg. 33229, and took effect on October 2, 1987.

[69] See Pub. L. No. 99-570, § 1804(b)(2) (not codified) (specifying that the new review charges may not be imposed before final issuance of implementing regulations).

together with a descriptive discussion of other implementation issues.

5. Implementation of the New Fee Waiver Standard

At the same time, the Department of Justice also issued a revised fee waiver policy guidance concerning the standards for the granting of fee waivers under the 1986 FOIA amendments. Those amendments specifically required federal agencies for the first time to adopt provisions addressing the subject of fee waivers, both substantively and procedurally, in their individual FOIA fee regulations.[70] As with all of its policy guidance in other areas (see pp. 68-89 infra) the Department prepared its revised fee waiver guidance in furtherance of its statutory responsibility to provide government-wide policy guidance and to assist all federal agencies in their implementation of the FOIA.[71]

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[70] See 5 U.S.C. § 552(a)(4)(A)(i), as enacted by Pub. L. No. 99-570, § 1803 (1986).

[71] There occasionally has been some question about whether the Department's fee waiver policy guidance is "binding" on other federal agencies. The simple answer is that it is not, because the Department of Justice has no direct authority to compel another federal agency to follow its FOIA policy guidance. This is equally as true for fee waiver policy matters as for any other FOIA matter in which the Department encourages uniform agency compliance with the Act in accordance with 5 U.S.C. § 552(e). However, where an agency has violated the requirements of the FOIA and is sued, the Department can decline to defend the suit, and has done so in some instances.

This guidance memorandum, entitled "New Fee Waiver Policy Guidance," was distributed to the heads of all federal agencies on April 2, 1987, as well as to all federal agency FOIA personnel through the Department's FOIA Update publication (Winter/Spring 1987, at 3-10).

This fee waiver policy guidance provided advice to assist the agencies in incorporating the specific terms of the new statutory standard into their implementing regulations and, in turn, in applying the new standard in the often-difficult day-to-day process of making fee waiver determinations. Like previous such guidance issued by the Department,[72] it focused closely on the exact language of the fee waiver standard enacted by Congress and upon how it should most appropriately be applied by the agencies in deciding specific fee waiver requests.

The guidance identified six individual analytical factors to be considered in making fee determinations, so that those determinations can be made intelligently and even-handedly, on a case-by-case basis, in accordance with the Act's requirements. Each of the factors derives clearly and directly

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[72] The Department of Justice has long provided specific policy guidance on the subject of fee waivers, including through formal policy statements issued at the Assistant Attorney General level or higher. Former Assistant Attorney General for Legal Policy Jonathan C. Rose had issued fee waiver policy guidance in early 1983, FOIA Update, Jan. 1983, at 3-4, which I had supplemented through a specific fee waiver policy statement issued in 1986 regarding record-repository institutions, FOIA Update, Summer 1986, at 3.

from the language of the revised statutory "public interest" standard, which establishes two basic requirements for the waiver or reduction of fees: first, that the disclosure in question "is likely to contribute significantly to public understanding of the operations or activities of the government," and second, that it "is not primarily in the commercial interest of the requester."[73]

To determine whether the first of these two basic fee-waiver requirements is met in any given case, an agency should consider four factors, according to the statute's own terms: (1) the subject of the request -- i.e., whether the subject of the requested records concerns "the operations or activities of the government"; (2) the informative value of the information to be disclosed -- i.e., whether the disclosure is "likely to contribute" to an understanding of that subject; (3) the contribution likely to result from disclosure -- i.e., whether the requested disclosure will contribute to "public understanding"; and (4) the significance of the contribution to public understanding -- i.e., whether that contribution will be, as the statute requires, "significant."

To determine whether the second basic statutory requirement is met, an agency should consider two additional factors: (5) the existence and magnitude of a commercial interest -- i.e., whether the requester has a "commercial

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[73] 5 U.S.C. § 552(a)(4)(A)(iii), as enacted by Pub. L. No. 99-570, § 1803 (1986).

interest" that would be furthered by the requested disclosure and, if so, the extent of such interest; and (6) the primary interest in disclosure -- i.e., whether the magnitude of any commercial interest is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Where it is determined that a public interest would be served by the requested disclosure, and is not outweighed by any commercial interest of the requester, a fee waiver or reduction "is compelled by the statute and should be granted freely and promptly by the agency."[74]

Consideration of these six analytical factors is plainly required by the terms of the specific statutory standard enacted to govern fee waiver decisionmaking. In setting them forth succinctly in this guidance memorandum -- with elaborated analysis and discussion of relevant case law under each -- the Department has provided sound, detailed guidance that adheres closely to the revised statutory terms and greatly assists all federal agencies in their implementation of this new provision.[75]

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[74] New Fee Waiver Policy Guidance (Apr. 2, 1987) at 3-4 (footnote omitted), reprinted in FOIA Update, Winter/Spring 1987, at 4-5.

[75] The guidance memorandum additionally addressed certain procedural matters pertaining to fee waiver determinations, expressly reaffirming the Department's 1983 guidance on such

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I am aware that this guidance memorandum has been the subject of no small amount of dispute, Mr. Chairman, just as the predecessor fee waiver policy guidance issued by the Justice Department under the prior statutory fee waiver standard was likewise controversial in many quarters. To a certain extent, I recognize, this is inevitable: In such a policy area as government information disclosure -- particularly on issues of fees and fee policy, it seems -- there always will exist strongly conflicting interests which yield sharply differing points of view. Yet the controversy that has arisen on this particular subject has sometimes been misplaced.

For example, almost immediately after this guidance memorandum was issued, there were assertions that the Department somehow had improperly "ignored" the "legislative history" of the new fee waiver provision.[76] That simply is not true. While the available legislative history of the 1986 FOIA amendments is limited -- essentially consisting of floor statements placed in the record by individual Members of Congress without any

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[75](...continued)
procedural matters (FOIA Update, Jan. 1983, at 4), and urged all agencies to contact the Department's Office of Information and Privacy regarding any fee waiver question that might arise. See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 12, reprinted in FOIA Update, Winter/Spring 1987, at 10.

[76] This was the position taken by the Chairman of the House Subcommittee on Government Information, Justice and Agriculture. However, the agencies overwhelmingly declined his suggestion that they not follow the Department's fee waiver guidance in their implementing regulations and fee waiver decisionmaking.

committee deliberation -- it was fully evaluated and taken into consideration by the Department in the preparation of all of its implementation guidance.

However, just as with the law enforcement amendments already discussed,[77] the individual legislative statements made regarding the fee waiver revision were found to be quite conflicting, both among themselves and also, in some cases, with the plain language of the new statutory provision itself. For example, though one such legislative statement suggested that fee waivers should be granted where disclosure could contribute to public understanding in "any meaningful way,"[78] the specific language of the statute requires the contribution to be a "significant" one.[79] On this very point, a different legislative statement asserted that the word "significant" should "be given its common force and weight."[80]

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[77] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987) at 3-4 & n.5.

[78] 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986).

[79] The Department's fee waiver guidance memorandum does specifically admonish agencies to apply the "significant" requirement in as objective a fashion as possible: "This [requirement] does not permit a separate value judgment by the agency as to whether the information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is 'important' enough to be made public." New Fee Waiver Policy Guidance (Apr. 2, 1987) at 9, reprinted in FOIA Update, Winter/Spring 1987, at 8.

[80] 132 Cong. Rec. S16505 (daily ed. Oct. 15, 1986).

Similarly, one legislative statement asserted that "public understanding" would be "enhanced every time that a single citizen uses the FOIA,"[81] thereby suggesting that a fee waiver should be granted under the revised standard every time even a single individual gains an understanding of the operations and activities of government through the disclosure sought. This suggestion for blanket fee waivers, however, is at odds with the express terms of the statutory standard, which provides for a fee waiver if the disclosure contributes significantly to the "public interest" in promoting "public" understanding. A conflicting legislative statement urged "that the qualifying word 'public' be applied so as to require a breadth of benefit beyond any particularly narrow interests that might be presented."[82]

In fact, on this particular point it should be noted that the Department of Justice receives numerous FOIA requests that are made by individuals, many of them prisoners, seeking access to records that pertain solely to themselves.[83] Many other federal agencies regularly receive numerous such requests as well. We see no basis in the language of the statutory standard enacted by the Congress that would require a public interest fee waiver for such an individual requester merely

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81 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986).

82 132 Cong. Rec. S16505 (daily ed. Oct. 15, 1986).

83 Because many kinds of criminal law enforcement records, for example, are categorically exempt from access under the Privacy Act of 1974, 5 U.S.C. § 552a(j)(2), the subjects of those records could have access to those records only under the FOIA.

because his own understanding of the operations or activities of the government would be "enhanced" by a FOIA disclosure of information to him -- without any showing of benefit to the public.[84] Some of the other legislative statements on the fee waiver issue similarly suggest results that cannot be squared with the plain language of the statutory standard enacted by the Congress.

Therefore, as with the law enforcement provisions of the 1986 FOIA amendments, the Department's policy guidance on the new fee waiver provision is based upon and quite faithfully adheres to the clear statutory language of the provision itself. This fully conforms with the well-established rule of statutory construction that the meaning of a statutory provision should ordinarily be determined according to the language of the statute itself and its plain meaning should be applied.[85]

Indeed, the Department's identification of the six fee waiver criteria as the proper ones to be considered under the revised standard has been supported by recent fee waiver case

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[84] A recent appellate court decision, in its preliminary consideration of the new statutory standard, emphasized that, for a waiver to be appropriate, it must be shown that "the primary benefit of turning over the documents sought would be to the general public rather than to the applicant." Savage v. CIA, 826 F.2d 561, 563 (7th Cir. 1987) (citation omitted).

[85] See, e.g., United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C. Cir. 1987).

law as well. While judicial interpretation of the new fee waiver standard has as yet been somewhat sparse, it is significant that the government's fee waiver position has been upheld by both appellate decisions to apply the new standard and the Department of Justice's fee waiver criteria thus far.

The Ninth Circuit Court of Appeals in McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987), ruled that public interest group requesters are not presumptively entitled to fee waivers under the new standard and that, just like any other requester, they must satisfy the requisite statutory standard in each case in order to obtain documents without charge. The court specifically approved the defendant agency's implementing fee waiver criteria, which were essentially identical to those set forth in the Department's fee waiver guidance; based upon those criteria, it concluded that the disclosure in question would not make the significant contribution to public understanding required by the statutory standard. See 835 F.2d at 1286-87.

More recently, the D.C. Circuit, in Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988), held that, even where the subject matter of a FOIA request is clearly of interest to the general public, the revised statutory standard demands more than just "establishing a public interest in [that] subject matter." Specifically, it concluded that a requester must be able to demonstrate an ability "to disseminate the information to the

public" before a fee waiver can be considered warranted; a requester's failure to demonstrate such an ability "alone is sufficient basis for denying [a] fee waiver request." Id. This construction of the terms of the statutory standard itself comports precisely with the Department's specific fee waiver guidance that a requester must show both an intention and an ability to disseminate the requested information to the general public, because absent such dissemination there can be no "significant contribution to public understanding" as required by the statute.[86]

6. The Question of Categorical Entitlement to Fee Waivers

The most controversial issue that has arisen since the issuance of the Department's new fee waiver guidance is whether certain types of FOIA requesters should be regarded as "categorically" entitled to a fee waiver simply on the basis of their status as a particular requester type. Some groups (certain media entities, public interest groups, and other organizations) have contended that they should have the benefit of an across-the-board legal presumption in their favor under the fee waiver standard -- in effect, that they should always receive a complete waiver of fees, regardless of what information is requested or actually disclosed, just because it is they who are doing the asking.

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[86] See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 8, reprinted in FOIA Update, Winter/Spring 1987, at 7-8.

The acceptance of such a position, of course, would forever relieve such requesters from any obligation to specifically identify a "public interest" to be served by the particular disclosure sought in their FOIA requests -- or, for that matter, to necessarily be careful to make only true "public interest" requests.

The Department of Justice firmly resists such claims of categorical entitlement to fee waivers as contrary to the statutory fee waiver standard, as well as sound public policy. First of all, such claims of categorical entitlement for any particular group of FOIA requesters cannot be squared with the Act's revised fee structure, which already provides a categorical limitation on fees for certain categories of requesters. Under this structure, educational and scientific institutions and bona fide representatives of the news media may be charged only duplication fees and are categorically entitled not to be charged search fees.[87] In light of this specific treatment for these categories of requesters, it would make no sense to conclude that they are also categorically entitled to a waiver of all duplication fees associated with their requests under the public interest fee waiver standard;[88] that interpretation would render

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[87] See 5 U.S.C. § 552(a)(4)(A)(ii)(II), as enacted by Pub. L. No. 99-570, § 1803 (1986).

[88] However, it is reasonable to presume that established media requesters, when engaged in traditional newsgathering

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entirely superfluous the particular fee-limitation provision specifically crafted by the Congress for such requesters.

Thus, the decision by the Congress not to specify any category of FOIA requester that would be entitled to special treatment under the fee waiver provision compels the conclusion that no particular type of requester is categorically entitled to a fee waiver, automatically, in all cases.[89]

Moreover, establishing any such categorical entitlement to fee waivers would violate sound public policy, not to mention simple common sense, because not all requests from a certain category of requester will necessarily involve information the disclosure of which would significantly increase public understanding of government operations or activities.[90] Although

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[88](...continued)
activities, should not be considered to be acting primarily in their commercial interest, notwithstanding the fundamentally commercial nature of their business. In almost all such instances, if any substantial public interest is found to exist, the connection between a FOIA disclosure and the commercial return realized by a news organization will be so attenuated and small as to presumptively be outweighed. The Department's fee waiver guidance memorandum explicitly articulates this presumption. See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 11, reprinted in FOIA Update, Winter/Spring 1987, at 10.

[89] Cf. Ely v. United States Postal Service, 753 F.2d 163, 165 (D.C. Cir.) (rejecting such categorical interpretation for indigents under previous fee waiver standard because Congress did not choose to create such favored category), cert. denied, 471 U.S. 1106 (1985).

[90] The Ninth Circuit in the McClellan decision, 835 F.2d at 1285-86, specifically rejected an attempt by the plaintiffs to establish such a presumption that all FOIA fees should be waived
(continued...)

certainly a representative of the news media or an established "public interest" group is more likely than most requesters to make a request that would readily satisfy the statutory standard,[91] this likelihood alone should not give rise to a categorical entitlement to a waiver for all such requesters in all cases. Providing such favored treatment could result in wide-ranging requests from such requesters running far afield of the requisites of the actual statutory standard. Surely that would not be within anyone's reasonable definition of the "public interest."[92] Rather, all fee waiver requests should be decided in an individual fashion, on their demonstrated merits, in

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[90](...continued)
whenever a request is made by a "public interest" group. This decision comports with the remarks on this point in even the broadest of the individual legislative statements made on the subject of fee waivers, which observed that "public interest groups . . . will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers." 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986) (emphasis added).

[91] Indeed, the Department's fee waiver guidance memorandum specifically recognizes that media representatives and other groups with established dissemination capabilities should readily be able to make a showing sufficient to satisfy the statutory standard in this critical respect. See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 8, reprinted in FOIA Update, Winter/ Spring 1987, at 8. The Department has long encouraged agencies to give such requesters the benefit of this recognition. See FOIA Update, Fall 1983, at 14 (specifically including this point under previous fee waiver guidance).

[92] One court considering a broad "public interest" fee waiver claim was moved to observe: "[T]he meaning of 'public interest' cannot become so broad and far-reaching that the public interest fee waiver is converted into the rule and not the exception." Conklin v. United States, 654 F. Supp. 1104, 1106 (D. Colo. 1987).

proper satisfaction of the plain requirements of the specific "public interest" standard chosen by the Congress.

This issue of categorical fee waiver entitlement has been raised most pointedly under the new fee waiver standard by the National Security Archive. As the Subcommittee perhaps is aware, that organization's stated objective is to acquire, package and sell FOIA-requested government records, pursuant to a predetermined sales schedule, to subscribing libraries and other customers.[93] Essentially, it has set itself up as a broker of government information -- information that could be obtained by any requester directly from the government -- and it now claims a categorical entitlement to public interest fee waivers in connection with any type of FOIA request it chooses to make, deeming itself always to be acting in the "public interest" when making FOIA requests regardless of what kind of information it seeks.[94]

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[93] See "A Development Grant Proposal For The National Security Archive" (revised Mar. 1, 1986), at 1-2 & n.1 In addition to its "archival" function, the Archive apparently plans to sell microform copies of specialized segments of its collections to its subscribing customers. See id.; see also FOIA Update, Winter 1986, at 1-2. In its efforts to establish its initial collection, the Archive has pursued enormous numbers of FOIA requests, many massive in scope, on a wide variety of subjects at many national security-related agencies.

[94] See National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C.), Complaint, filed Dec. 17, 1986, at ¶ 41. In its own words, the Archive asserts that it "is therefore institutionally qualified for and presumptively entitled to fee waivers in all of its FOIA requests pending before [the agency]." Id.

This very concern about potential misuse of the fee waiver provision by such record repositories is what prompted the issuance of my supplemental fee waiver policy guidance regarding such institutions in November 1986.[95] I was then, and continue to be, greatly concerned about the prospect of large-scale FOIA requests being filed by record-repository institutions who categorically seek fee waivers merely on the basis of their status as such. It is contrary to sound public policy to ask the taxpayers to unconditionally support such institutions, without regard to the specifics of what is being requested and how it will be used to benefit the general public. Unlike documents provided to individuals who satisfy the fee waiver standard because they are disseminated directly to the public in a way that serves the "public interest," a large proportion of documents provided to such record repositories may, for all that is known, never be used to serve the "public interest" in any way. The Department's policy guidance on this point therefore clearly specifies that their fee waiver requests, like those of any other requester, should be decided on a case-by-case basis.[96]

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[95] See Supplemental Fee Waiver Guidance (Nov. 12, 1986), reprinted in FOIA Update, Summer 1986, at 3.

[96] My 1986 guidance emphasized that fee waiver requests from such record-repository institutions should be analyzed in each case to determine whether any particular person will use and disseminate the requested information to the benefit of the public. See id. This guidance later was incorporated into the Department's revised, comprehensive fee waiver guidance. See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 8-9, reprinted in FOIA Update, Winter/Spring 1987, at 8.

No one should have illusions, though, that the price of such "categorical" folly would be borne only by the taxpayers (indirectly) and government administrators (more directly). It would be borne also by every other FOIA requester, each of whom necessarily would be disadvantaged by such an organizational requester's preferential treatment. All FOIA requesters, like it or not, unavoidably compete for a finite supply of agency time and taxpayer resources. The realization of a single FOIA requester's self-interest, to the degree contemplated here, can easily work to all other FOIA requesters' detriment.

Indeed, it seems that all the dispute and controversy over the Department's fee waiver policy guidance -- when stripped of its rhetoric and analyzed for what it really is -- essentially boils down to the objections of certain groups to what is for them the unacceptable idea that they are not categorically entitled to a fee waiver or taxpayer subsidy just by virtue of their asking. But there is no room for anything other than firm disagreement with such claims of entitlement -- that particular requesters should not be required to show their satisfaction of the statutory standard. The clear statutory command requires no less. As I have made plain, the Department simply cannot agree with the notion of categorical fee waiver entitlement and it has opposed it wherever it has been raised, including before the

courts in pending litigation.[97] I suspect that this controversy will ultimately be put to rest only in that forum.

7. Other Issues Concerning the Fee Provisions

A related controversy in the general fee area merits a brief discussion concerning the amended Act's new fee limitation provisions -- which provide complete exemption from search fees for the three favored categories of requesters -- and their proper implementation by OMB and, in turn, by individual agencies. This particular controversy concerns the proper definitions of the terms "educational institution," "noncommercial scientific institution," and "representative of the news media" under these provisions. OMB holds policy responsibility under the 1986 amendments for all FOIA fee and fee-limitation matters. Because I understand that OMB is not being requested by the Subcommittee to testify as to the implementation of these amendments, or as to current FOIA fee practices, I have included a discussion of this issue in order to present a comprehensive overview of the government's implementation activities.

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[97] See, e.g., National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C.), Answer, filed Jan. 30, 1987, at ¶ 41. This issue has been raised in another pending case, in which the Department has opposed a claim that historical researchers are presumptively entitled to public interest fee waivers. See Fitzgibbon v. Agency for Int'l Development, Civil No. 87-1548 (D.D.C.), Defendants' Memorandum In Opposition to Plaintiff's Cross-Motion For Summary Judgment, filed Feb. 5, 1988, at 3-4.

One of the first issues to arise in litigation concerning the new fee structure was whether an agency's new fee regulations -- specifically, its definitions of these categories of favored requesters -- could be defended on the ground that they conformed to OMB's uniform fee guidelines. In the recent case of National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C. June 16, 1988) (appeal pending), the Archive argued that OMB's fee guidelines were not controlling with respect to agency definitions of these special categories of requesters and that the Department of Defense's definitions (identical to those set forth by OMB and deemed not to encompass the plaintiff Archive) should be struck down as contrary to the statutory language and underlying legislative intent.[98]

The district court firmly rejected this challenge. Without deciding whether OMB's fee guidelines are necessarily controlling, the court observed that the 1986 FOIA amendments expressly delegated to the agencies the responsibility of implementing the new fee structure. See slip op. at 3. The court squarely upheld the Department of Defense's definitions as a reasonable implementation of the statutory language. See id. at 9-13. It held, in short, that the Archive does not fall

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[98] See National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C.), Plaintiff's Second Motion For Summary Judgment, filed Nov. 20, 1987, at 31-33.

within the reasonable definition of any of the three favored categories.

This first decision on this contentious issue carries great government-wide significance, because virtually all federal agencies' fee regulations contain category definitions identical to those challenged in this case. There doubtless will be further disputes over the precise contours of these special fee-limitation categories. As far as government-wide implementation policy in this area is concerned, the Department of Justice leaves such matters to OMB and the individual agencies for resolution.

III. OTHER GUIDANCE ACTIVITIES

Apart from the Department of Justice's guidance activities regarding the implementation of the 1986 FOIA amendments, it has for many years engaged in numerous government-wide activities designed to guide the proper interpretation and implementation of the Act overall. For the past seven years, these FOIA guidance responsibilities have been discharged through the Office of Information and Privacy, which is part of the Department's Office of Legal Policy.

OIP was created near the beginning of this Administration to serve as a central location for the handling of the Department's major FOIA responsibilities. Two predecessor

offices were merged: the former Office of Privacy and Information Appeals, which primarily held responsibility for adjudicating all administrative appeals from FOIA access denials by Department components; and the former Office of Information Law and Policy, which discharged the Department's government-wide policy guidance responsibilities under the Act.

The consolidation of these two offices' functions and resources into OIP -- which is headed by two co-directors and has a combined attorney and paralegal staff of nearly thirty -- greatly strengthened the Department's functioning in this important area. This has been especially so with respect to OIP's ability to engage in government-wide FOIA policy guidance activities, under the supervision of the Assistant Attorney General for Legal Policy.

Over the course of the past several years, OIP has considerably enhanced the Department's capability to provide government-wide FOIA policy advice and guidance through its many publication, training and advisory activities. OIP has been able to achieve this, along with handling its other FOIA responsibilities (including the adjudication of a growing number of initial requests and administrative appeals), with no increase to its staff complement. Both the breadth and depth of these activities have far exceeded all previous such efforts, which has been necessary to meet the increasing demands for high-quality

FOIA advice and guidance that have been made upon the Department.

A. FOIA Policy Initiatives

Most significantly, OIP has undertaken to examine a wide range of legal and policy issues arising under the Act, including some critical issues never before addressed, and to formulate cogent policy statements and initiatives for the guidance of all federal agencies. Major policy initiatives have been undertaken in such important areas as the protection of business information, the proper application of the attorney work-product privilege, the protection of sensitive settlement-negotiation data, the interaction of the FOIA and the Copyright Act, the protection of personal privacy interests, and the handling of congressional requests for access to agency records. OIP's policy guidance in these and other subject matter areas has become firmly established in both administrative practice and applicable FOIA case law.

In providing its detailed, written analyses on a range of both substantive and procedural FOIA issues -- all of which are disseminated through its FOIA Update publication -- OIP guides all agencies in their understanding of these issues and promotes their proper and uniform resolution throughout the Federal Government. Major highlights of the subjects addressed in FOIA Update during this Administration are:

1981

-- The disclosure and protection of information regarding federal employees and job performance.[99]

-- The relationship between the FOIA and access through civil discovery.[100]

1982

-- The complex interrelationship of the FOIA and the Privacy Act with civil discovery rules and practices.[101]

-- The procedural protections to be afforded submitters of business information requested under the FOIA (guidance issued in coordination with the Presidential Task Force on Regulatory Relief).[102]

-- The status of "personal notes" under the FOIA.[103]

-- The proper "referral" of FOIA requests for records originating at other agencies.[104]

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[99] See FOIA Update, June 1981, at 4. See also FOIA Update, Sept. 1982, at 3 (follow-up guidance).

[100] See FOIA Update, Dec. 1981, at 10. See also FOIA Update, Summer 1985, at 5 (follow-up guidance).

[101] See FOIA Update, Mar. 1982, at 3. See also FOIA Update, Summer 1984, at 2 (follow-up guidance).

[102] See FOIA Update, June 1982, at 3. See also FOIA Update, Summer 1987, at 1-3 (follow-up guidance under Exec. Order No. 12600).

[103] See FOIA Update, June 1982, at 5. See also FOIA Update, Fall 1984, at 3-4 (follow-up guidance).

[104] See FOIA Update, June 1982, at 5. See also FOIA Update, Summer 1983, at 5 (follow-up guidance).

-- The application of the threshold requirement of Exemption 5 in connection with "outside" recommendations received by agencies.[105]

-- The delineation under Exemption 6 of sensitive from nonsensitive personnel information and mailing-list data.[106]

-- The disclosure of personal information pertaining to deceased persons under the FOIA.[107]

-- The balancing of public interests against personal privacy interests under Exemptions 6 and 7(C).[108]

1983

-- The proper handling of procedural considerations surrounding the making of fee waiver determinations (procedural guidance issued together with previous fee waiver policy guidance).[109]

-- The protection of "draft" documents under Exemption 5.[110]

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105 See FOIA Update, June 1982, at 10.

106 See FOIA Update, Sept. 1982, at 3.

107 See FOIA Update, Sept. 1982, at 5.

108 See FOIA Update, Sept. 1982, at 6.

109 See FOIA Update, Jan. 1983, at 4.

110 See FOIA Update, Jan. 1983, at 6. See also FOIA Update, Spring 1986, at 2 (follow-up guidance).

-- The interplay of the Privacy Act and Exemption 3.[111]

-- The circumstances under which an agency can be deemed to have waived its right to invoke a FOIA exemption.[112]

-- The legal and policy considerations according to which agencies should rule on requests for special expedited FOIA processing.[113]

-- The use of the attorney work-product privilege under Exemption 5.[114]

-- The handling of copyrighted materials under the FOIA, including the status of the Copyright Act under Exemption 3 and its interplay with Exemption 4.[115]

-- The treatment of unit prices under Exemption 4.[116]

-- The use of "cut-off" dates for determining records responsive to FOIA requests.[117]

-- The protection of commercial information under Exemption 5.[118]

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111 See FOIA Update, Spring 1983, at 3. See also FOIA Update, Fall 1984, at 4 (follow-up guidance).

112 See FOIA Update, Spring 1983, at 6.

113 See FOIA Update, Summer 1983, at 3.

114 See FOIA Update, Summer 1983, at 6. See also FOIA Update, Fall 1984, at 6 (follow-up guidance).

115 See FOIA Update, Fall 1983, at 3-5.

116 See FOIA Update, Fall 1983, at 10-11. See also FOIA Update, Fall 1984, at 4 (follow-up guidance).

117 See FOIA Update, Fall 1983, at 14.

118 See FOIA Update, Fall 1983, at 14.

-- The lesser-known "third test" for the protection of sensitive commercial information under Exemption 4.[119]

1984

-- The handling of congressional requests for access to agency records and the significance under the FOIA of congressional disclosures.[120]

-- The unique "burden" protection afforded under Exemption 2.[121]

-- The "generic" protection available for law enforcement records under Exemption 7(A).[122]

-- The inability to regard another federal agency as a "confidential source" under Exemption 7(D).[123]

-- The delineation of "personal records" from "agency records" under the FOIA.[124]

-- The significance of the Federal Acquisition Regulation under Exemption 4.[125]

-- The protection of factual information in accordance

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119 See FOIA Update, Fall 1983, at 15.

120 See FOIA Update, Winter 1984, at 3-4.

121 See FOIA Update, Winter 1984, at 10-11.

122 See FOIA Update, Spring 1984, at 3-4.

123 See FOIA Update, Spring 1984, at 7.

124 See FOIA Update, Fall 1984, at 3-4.

125 See FOIA Update, Fall 1984, at 4. See also FOIA Update, Winter 1986, at 6 (follow-up guidance).

with the full contours of the attorney work-product privilege under Exemption 5.[126]

1985

-- The protection of records having "intrinsic commercial value" under Exemption 4.[127]

-- The proper treatment of the identities of FOIA and Privacy Act requesters under the FOIA.[128]

-- The use of the attorney-client privilege under Exemption 5.[129]

-- The making of "automatic" disclosures under the Act.[130]

-- The status of "discretionary" disclosures under Exemption 4.[131]

-- The use of the FOIA for discovery purposes.[132]

-- The applicability of "preclusion" doctrines (res judicata and collateral estoppel) under the FOIA.[133]

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126 See FOIA Update, Fall 1984, at 6. See also FOIA Update, Summer 1987, at 4-5 (follow-up guidance).

127 See FOIA Update, Winter 1985, at 3-4.

128 See FOIA Update, Winter 1985, at 6.

129 See FOIA Update, Spring 1985, at 3-4.

130 See FOIA Update, Spring 1985, at 6.

131 See FOIA Update, Summer 1985, at 3.

132 See FOIA Update, Summer 1985, at 5.

133 See FOIA Update, Summer 1985, at 6.

-- The necessary protection of settlement-negotiation records under Exemptions 4 and 5.[134]

1986

-- The application of the "Glomarization" (neither confirm nor deny) principle to protect personal privacy interests in law enforcement records under Exemption 7(C).[135]

-- The propriety of processing all first-party access requests under the FOIA even if they cite the Privacy Act and not the FOIA.[136]

-- The protection of the identities of persons who write letters to government officials, under Exemptions 6 and 7(C).[137]

-- The handling of a FOIA requester who breaches a commitment to pay properly assessed fees.[138]

-- The treatment of federal personnel mailing lists under Exemptions 2 and 6.[139]

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134 See FOIA Update, Fall 1985, at 3-4.

135 See FOIA Update, Winter 1986, at 3-4. See also FOIA Update, Spring 1986, at 2 (follow-up guidance).

136 See FOIA Update, Winter 1986, at 6 (declining to adopt contrary suggestion by OMB).

137 See FOIA Update, Winter 1986, at 6.

138 See FOIA Update, Spring 1986, at 2.

139 See FOIA Update, Summer 1986, at 3-4.

-- The status of the Trade Secrets Act, 18 U.S.C. § 1905, under Exemption 3.[140]

-- The treatment of factual information under the deliberative process privilege and Exemption 5.[141]

1987

-- The proper handling of procedural considerations surrounding the Act's new fee and fee waiver provisions, particularly during the "interim period" before new agency regulations took effect.[142]

-- The procedural protections to be afforded submitters of business information through agency regulations implementing Executive Order No. 12600.[143]

-- The protection of witness statements in accordance with the attorney work-product privilege under Exemption 5, among other possible FOIA grounds.[144]

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140 See FOIA Update, Summer 1986, at 6.

141 See FOIA Update, Summer 1986, at 6.

142 See FOIA Update, Winter/Spring 1987, at 1-2 (issued in coordination with OMB).

143 See FOIA Update, Summer 1987, at 1. Executive Order No. 12600, which was prepared by the Executive Office of the President with the assistance of OIP, formally required all executive departments and agencies to promulgate regulations specifically providing certain "submitter-notice" protections for submitters of business information that could be requested under the FOIA. See 52 Fed. Reg. 23781 (June 23, 1987), reprinted in FOIA Update, Summer 1987, at 2-3. See also, e.g., 53 Fed. Reg. 27161 (July 19, 1988), to be codified at 28 C.F.R. § 16.7 (Justice Department "submitter-notice" regulation).

144 See FOIA Update, Summer 1987, at 4-5.

B. FOIA Update

As has been noted, OIP's primary means of disseminating its formal FOIA advice and policy guidance is through FOIA Update, its quarterly policy publication. This publication was initiated by the Department in late 1979 for the general purpose of promoting the proper administration of the Act.[145] Since 1982, OIP has upgraded both the content and scope of FOIA Update and has employed it as a high-quality vehicle for the wide dissemination of policy guidance and FOIA-related information.[146]

The Department's major policy statements on FOIA issues are presented in FOIA Update as "OIP Guidance" or "FOIA Counselor" analyses. In 1982, OIP inaugurated an additional FOIA Update feature, the "FOIA Counselor Q & A," through which it can address many specific questions or policy issues in a concise and efficient manner. Since then, OIP has answered literally dozens of such questions through this "Q & A" format, most of which

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[145] See FOIA Update, Autumn 1979, at 1.

[146] More than 3,000 copies of FOIA Update are distributed to agency FOIA personnel throughout the Federal Government and to other interested governmental recipients without charge. FOIA Update is also sold through the Government Printing Office to nongovernmental subscribers at the nominal cost of $5.00 per year; in 1987, it had a paid circulation of 1,225.

derive directly from the "FOIA Counselor" telephone inquiries that it receives.[147]

OIP also has devoted some entire issues of FOIA Update to a single theme or subject under the Act. One such issue addressed the protection of privacy interests under the FOIA's privacy exemptions.[148] Another addressed various issues surrounding the Act's treatment of business information.[149] A third such theme issue dealt with law enforcement records and the protections available for them under the Act.[150]

Other expanded features of FOIA Update have served to keep agency FOIA personnel advised of various aspects of FOIA administration and practice. Through its "On Agency Practice" feature, FOIA Update has surveyed and addressed agency practices in a variety of areas, such as privacy protection,[151] the assessment of fees,[152] business-information processing,[153] FOIA

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147 As is described below, OIP's "FOIA Counselor" service constitutes a major part of its FOIA guidance activities. Its use has increased dramatically over the years, in no small part due to the fact that it has been widely publicized (with its special telephone number, 633-FOIA) through this FOIA Update feature.

148 See FOIA Update, Sept. 1982.

149 See FOIA Update, Fall 1983.

150 See FOIA Update, Spring 1984.

151 See FOIA Update, Sept. 1982, at 1-2.

152 See FOIA Update, Jan. 1983, at 1-2.

(continued...)

training,[154] national-security classification,[155] litigation procedures,[156] and the mechanics of FOIA processing.[157] Likewise, its expanded "Significant New Decisions" and "Supreme Court Update" features have kept agencies fully abreast of major FOIA judicial decisions, as have its many "Legislative Update" articles tracked the ups and downs of FOIA reform and other legislative developments as they have occurred.[158]

In sum, the Department has greatly improved its government-wide dissemination of FOIA advice and policy guidance in recent years through OIP's development of its FOIA Update publication. Any comparison of this publication since 1982 with its earlier editions will reveal the full measure of that quantitative and qualitative development.

153(...continued)
153 See FOIA Update, Fall 1983, at 1, 12. See also FOIA Update, June 1982, at 4-5.

154 See FOIA Update, Winter 1984, at 1, 2, 6. See also FOIA Update, Summer 1986, at 1-2.

155 See FOIA Update, Winter 1985, at 1-2.

156 See FOIA Update, Summer 1985, at 1-2.

157 See FOIA Update, Fall 1985, at 1-2.

158 Other items of information regularly provided in FOIA Update include quarterly listings of FOIA training opportunities and detailed listings (updated every two years) of the principal FOIA legal and administrative contacts at all federal agencies. See, e.g., FOIA Update, Winter 1988, at i-iv (current FOIA contact list). Additionally, a cumulative index to FOIA Update through 1987 can be found in the Fall 1987 issue, at pp. i-viii.

C. Case List and "Justice Department Guide to the FOIA"

A second publication by which OIP disseminates FOIA information and policy guidance is its annual Freedom of Information Case List, which now also includes the "Justice Department Guide to the Freedom of Information Act."

The Case List was begun by the Department many years ago in order to establish a useful compilation of all FOIA decisions of precedential significance, which could be updated annually. The September 1987 edition has grown to include more than 2,700 such FOIA decisions -- each of which is carefully indexed according to specific subject matter topics -- and also contains an indexed list of Privacy Act cases, various other specialized lists of access cases, a comprehensive list of related law review articles, and copies of all of the major federal access statutes. The 1988 version presently is in preparation.

The "Justice Department Guide to the Freedom of Information Act" has come to be perhaps the most vital part of this Case List publication. Originally known as the "Short Guide to the FOIA," it was originated by the Department in the late 1970's as a brief supplement to the Case List that provided a general overview of the Act's basic provisions.

In 1982, OIP prepared a completely new "Short Guide" which more comprehensively discussed the issues arising under the Act with more detailed reference to applicable FOIA case law. Since then, as OIP has expanded and updated this document each year, it has grown to serve as the principal government reference guide to the Act's implementation.

Indeed, what is now known as the "Justice Department Guide to the FOIA" -- because it no longer is at all "short" -- is a highly detailed, 143-page discussion of the Act's major substantive and procedural aspects, presented with extensive references to the evolving FOIA case law that governs the proper interpretation and application of the Act's provisions.[159] It is widely used by federal agency FOIA personnel and also those outside the Federal Government as both an introductory overview of the Act as well as the most detailed, up-to-date analysis of even its finest points.[160] OIP's development of the former "Short Guide" into such a comprehensive FOIA treatise has immeasurably enhanced the understanding and proper application of

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159 "Justice Department Guide to the Freedom of Information Act" (1987 edition), published in Freedom of Information Case List (Sept. 1987), pp. 315-457.

160 As part of the Case List, the "Guide" is disseminated each year to thousands of recipients throughout the Federal Government (including by electronic access through the Department's JURIS System) and is distributed to the public directly through the Government Printing Office and also through federal depository libraries. Additionally, the "Guide" has also been reproduced, almost verbatim, as the major chapter of a privately published loose-leaf volume dealing with the FOIA. See J. Franklin & R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts, pp. 1-9 through 1-156 (2d ed. 1986).

the FOIA throughout the Federal Government and the entire FOIA community.[161]

D. FOIA Training Activities

Similarly, OIP has greatly expanded the Department's government-wide FOIA training activities during the past seven years. The careful training of all FOIA personnel throughout the federal government is essential to the Act's proper and uniform administration. Such instruction is particularly crucial due to the relatively high turnover of FOIA duty assignments at most federal agencies -- with new employees often thrust into this area with little relevant experience or preparation -- and the fact that many agency employees necessarily become involved in FOIA matters on a part-time or ancillary-duty basis.

In recognition of this, OIP has instituted a number of measures to increase both the range and depth of the FOIA training that is made available to all agency FOIA personnel. Prior to OIP's creation, the Department offered a single basic FOIA training course that served as the government's primary FOIA training program but covered the Privacy Act as well; it was offered, through the Department's Legal Education Institute

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[161] One measure of this development (and of the FOIA industry generally) is that the current "Justice Guide" is more than five times greater in length than the "Short Guide" that existed in 1980.

("LEI"), three or four times per year and, as structured, did not fully meet the agencies' FOIA training needs.

In 1982, OIP redesigned this course with LEI to make it a two-day program of instruction devoted entirely to the FOIA that could be offered five or six times annually.[162] This restructured training program, entitled "The Freedom of Information Act for Attorneys and Access Professionals," soon became very heavily subscribed; even with its increased number of offerings, and with a maximum class size of nearly 100 for each session, the demand for it far exceeded its available training capacity.

OIP took several further steps to meet this high FOIA training demand. In 1982, it took a survey through FOIA Update of all federal agencies to determine the volume and range of their FOIA training needs.[163] Based upon the results of this survey, OIP developed a new training session, its "Advanced Seminar on the FOIA," which it inaugurated in 1983 to meet the

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[162] In this reconfiguration, the Privacy Act instruction was broken out into a separate new seminar that was offered twice per year, beginning in 1983, in coordination with OMB, which holds government-wide policy responsibility for the Privacy Act. Though this Privacy Act seminar subsequently was discontinued for a period of time, it was reinstated in 1987 at OIP's urging.

[163] See FOIA Update, Mar. 1982, at 8. See also FOIA Update, Sept. 1982, at 8.

FOIA training needs of experienced FOIA personnel.[164] Toward this same end, it added another new FOIA course the following year, entitled "Introduction to the FOIA for Non-Specialists," which it designed to meet FOIA training needs at the other end of the spectrum, i.e., to provide a half-day of instruction to those agency employees whose involvement with the Act requires no more than introductory training.

Although OIP's presentation of each of these two new sessions twice each year as of 1984 helped to offset the increasing demand for FOIA training, that demand nevertheless continued to grow. In fact, during the next two years the demand for participation in the Department's basic, two-day FOIA course grew to the point at which it regularly received more than 200 applications for less than 100 available spaces in each program. This course was accordingly conducted for a record number of participants during 1984 and 1985, including through a special "double session" held in July 1984 to accommodate more than 200 students.

In 1986, OIP took an additional step in its efforts to

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[164] This special FOIA seminar, which has been conducted by OIP twice annually since 1983, is limited to a selected group of only the most experienced agency FOIA personnel and is designed to cover matters not able to be addressed in the basic FOIA course. It regularly includes, for example, a guest presentation from a prominent member of the FOIA community on the topic of "FOIA From the Non-Governmental Perspective."

meet this undiminishing demand.[165] Based upon the premise that many agency FOIA employees primarily require only a periodic training update on recent FOIA developments, OIP developed a new FOIA training seminar designed to satisfy that exact need. Entitled the "Annual Update Seminar on the FOIA," this new training session was offered for the first time in the fall of 1986 and drew nearly 250 attendees. It now is conducted by OIP during the first week of October each year immediately upon completion of the annual "Justice Department Guide to the FOIA," a special pre-publication copy of which is provided to all seminar participants.

In addition to its integral role in these FOIA training programs offered directly by the Department, OIP also has drawn extensively upon its professional staff to support other government-sponsored FOIA training programs -- principally those conducted by the Office of Personnel Management and the USDA Graduate School -- as well as such training sessions held by

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[165] The Department's FOIA training courses have consistently been the most heavily subscribed LEI training programs over the past several years, with the highest attendance rates as well. As of 1986, the Department continued to receive between 225-275 agency applications for each offering of the basic, two-day course. Early in that year, though, LEI suffered severe budgetary constraints and related difficulties which limited its ability to maintain its role in FOIA training. See FOIA Update, Winter 1986, at 8. To ensure the uninterrupted availability of high-quality FOIA training, however, OIP assumed LEI's organizational role and has continued to provide the full roster of FOIA training programs, partly under the auspices of the Department's Office of Legal Education, since that time. See FOIA Update, Summer 1986, at 1-2.

nongovernmental organizations.[166] Each year for the past several years, OIP representatives have made literally scores of presentations at a variety of FOIA training sessions, including many that are tailored by OIP to meet the particular needs of individual federal agencies.[167] Through its heavy devotion of attention and resources to the training of agency FOIA personnel throughout the Federal Government, we believe that OIP has considerably enhanced the Department's leadership role in this area.

E. FOIA Counseling

The final major component of the Department's government-wide FOIA guidance activities is its advice-giving function, which is undertaken primarily through OIP's "FOIA Counselor" service. The Department established the "FOIA Counselor" mechanism -many years ago, as a means of encouraging agencies to raise their questions about the Act to the Department for its attention and resolution. Such questions can range from basic informational queries to requests for a dispositive

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[166] The availability of FOIA training is made widely known through the "FOIA Training Opportunities" feature which regularly appears in FOIA Update.

[167] See FOIA Update, Summer 1986, at 2; FOIA Update, Winter 1984, at 6. OIP's extensive training activities, as well as its other government-wide guidance activities, are regularly described in detail in the Department's Annual FOIA Report to Congress. See, e.g., "Description of Department of Justice Efforts to Encourage Agency Compliance with the Act" (contained in the Department's 1987 Annual FOIA Report), at 148-52.

analysis of all legal issues necessarily involved in a specific FOIA determination.

Most such questions take the form of telephone inquiries about pending or contemplated FOIA actions,[168] but often such matters require more extensive consultations. In all instances, it is essential for any agency employee working on a FOIA matter to know that an experienced Justice Department attorney is available to address any question that might arise.

Since 1982, OIP has placed increased emphasis upon this vital service, which has resulted in large increases in the volume of its usage year after year. By promoting it through prominent mention in FOIA Update and in all of its training programs, and through the use of a special, readily remembered "hotline" number (633-FOIA), OIP has steadily increased agency reliance upon its "FOIA Counselor" service. It now receives more than 2,000 such inquiries annually -- a more than two-fold increase over pre-1982 "FOIA Counselor" activity. This service thus has become an integral part of the Act's government-wide implementation.

Additionally, OIP has continued the Department's related "ombudsman" role of responding to requests for assistance

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[168] The Justice Department's FOIA policy regulation specifically encourages any agency intending to deny a FOIA request raising a novel issue to consult with the Department before doing so. See 28 C.F.R. § 0.23a(b) (1987).

received from dissatisfied FOIA requesters who believe that the federal agencies processing their requests are operating contrary to, or under a misunderstanding of, applicable legal requirements. In pursuing the relative handful of such assistance requests received each year, OIP attempts to ensure that there is an accurate understanding of the law and that the agency involved achieves full and proper compliance with its FOIA obligations.[169] Last year, FOIA Update specially highlighted the availability of this traditional Justice Department service to FOIA requesters.[170]

IV. CONCLUSION

In conclusion, Mr. Chairman, I would like to say that I very much appreciate this opportunity to set forth the Department of Justice's policy perspectives and accomplishments regarding the Freedom of Information Act. The Department is justifiably proud of its long tradition of government-wide guidance activities in this area -- including its most recent implementation activities under the 1986 FOIA amendments -- and it is particularly proud of the fact that these FOIA guidance activities have been expanded and upgraded considerably during

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[169] While OIP does not interfere with an ongoing administrative appeal process, nor does it involve itself in this way in a matter that has proceeded to litigation, it is available to examine any specific allegations of agency noncompliance with the Act that are brought to its attention.

[170] See FOIA Update, Fall 1987, at 2.

the past seven years of the Administration and through the creation of the Office of Information and Privacy.

While I recognize that there always will be differences of opinion in so volatile a public policy area as government information disclosure, such differences should be placed in perspective and not be portrayed as broader than they actually are. There certainly has been a great deal of public debate and controversy over the particular subject of "public interest" fee waivers under the FOIA -- and, to a somewhat lesser extent, over the making of fee determinations generally -- but even that derives almost entirely from inevitably conflicting public and private interests. Moreover, the undeniable fact remains that there has been little if any basis or occasion for dispute over the wide range of policy initiatives and activities undertaken by the Department in all other FOIA subject matter areas.

It is not always an easy task to achieve a proper balance among the several "public interests" that uniquely coincide -- and often conflict -- under the Freedom of Information Act. Yet we all must continue to pursue that equilibrium. The strong public interest in fostering governmental accountability through the disclosure of records simply cannot be considered in a vacuum. Rather, it is incumbent upon us as government officials to recognize -- and to accommodate -- those other legitimate public interests in protecting sensitive records, promoting governmental efficiency

and fiscal responsibility, and minimizing the use of taxpayer subsidies under FOIA for purely private interests.

The administration of the Freedom of Information Act, which promotes valuable citizenship participation in government, is a very important part of our federal system. It has benefited from your efforts, Mr. Chairman, in working towards a balanced approach under the Act. I can assure you that as the Department of Justice continues to work towards achieving this balance, it remains committed to the full and faithful implementation of the Act -- to consistently achieving, in the words of both the Supreme Court and the Senate Judiciary Committee, "the fullest responsible disclosure."[171]

I would be pleased to address any question that you or any other Member of the Subcommittee might have on this subject.

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171 Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)).

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

09 JAN 1989

Honorable Patrick J. Leahy
Chairman
Subcommittee on Technology and the Law
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter of December 15, 1988, to Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, forwarding written questions as a follow-up to his testimony at the Subcommittee's FOIA oversight hearing held on August 2, 1988. Enclosed are Assistant Attorney General Markman's answers to the two sets of questions posed, together with three books of FOIA training materials that are forwarded for the Subcommittee's reference.

I want to thank you for noting the cooperative efforts of our respective staffs on FOIA matters during this past fall. The Department of Justice looks forward to working together with the Subcommittee on FOIA matters of congressional interest and to building upon the spirit of cooperation spoken of in your letter.

Sincerely,

Thomas M. Boyd
Assistant Attorney General

Enclosures

FOIA OVERSIGHT HEARING, AUGUST 2, 1988 BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON TECHNOLOGY AND THE LAW. QUESTIONS FOR THE HEARING RECORD BY SENATOR PATRICK LEAHY FOR:

STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

1. In your testimony before the Subcommittee, you referred to "ensuring that Congressional policy is enforced in not disclosing certain categories of information that are the subject of the nine FOIA exemptions." [Hearing Transcript at 8]. Are you suggesting that if a FOIA exemption may be applied, it must be applied? If so, how do you square that view with the presumption that FOIA exemptions are discretionary not mandatory, see, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979)? Further does the Department of Justice ensure that segregable portions are disclosed, as required by the statute?

ANSWER: No, I did not mean to suggest that if a FOIA exemption may be applied, it must be applied. Rather, in the full context of my opening oral remarks before the Subcommittee, I sought to sketch the various "public interests" that are embodied in the Freedom of Information Act, and noted that Congress has defined specific contexts in which the protection of sensitive information under the Act's exemptions is in the public interest. My written statement to the Subcommittee (pages 6-8) outlined these interests in greater detail. Of course, the FOIA's exemptions are discretionary rather than mandatory, and the Department and other agencies may make discretionary disclosures of otherwise exempt information, unless another provision of law restricts disclosure. As for the disclosure of "reasonably segregable" portions of requested records under the Act, 5 U.S.C. § 552(b) (last sentence), the Department of Justice adheres to the statutory requirement that all such nonexempt record portions be disclosed.

2. You referred in your testimony to "seeing that scarce taxpayer resources are used in a fiscally responsible and productive manner" [Hearing Transcript at 8] for FOIA administration. However, at least half a dozen other agencies, with fewer FOIA requests to process than the Department of Justice, collected more fees than the Department of Justice. What are you doing to see that the Department of Justice improves its fee collection process, particularly with regard to requests that would lawfully fall within the commercial requester category?

ANSWER: I suspect, largely for three reasons, that the Department of Justice will never be among the agencies with the highest amounts of FOIA fees collected. First, many of the requests responded to by the Department of Justice

result in a disclosure for which no fee may be charged because it does not exceed the minimum fee assessment threshold for noncommercial requesters (180 pages where no search fees are involved). Second, because disclosure of the records in a large proportion of our "project" cases is in the public interest, fees are waived. Third, perhaps because of the nature of records maintained by the Department of Justice -- as contrasted with those of other more "business-oriented" agencies -- we have a smaller proportion of commercial requesters. To ensure that commercial requester are assessed appropriate fees for FOIA services all components of the Department were provided with a copy of the Department's final fee and fee waiver regulation as soon as it was published, and this was followed up by discussions with senior FOIA personnel of those components most likely to receive commercial requests.

3. The FOIA establishes a 20-day time limit for administrative appeals. The Department of Justice has a unique obligation to see that statutory time limits are enforced, since it represents the agencies when fee determinations are appealed and trains FOIA officers on FOIA processing. You testified that the Department of Justice missed "most" of its statutory deadlines for FOIA requests in 1987. [Hearing Transcript at 44]. Exactly how many statutory deadlines did the Department miss in 1987? What steps are being taken to improve this situation?

ANSWER: The Department of Justice did not meet the 20-day time limit in 1,544 (approximately 75%) of the administrative appeals closed in 1987. Adjudicating administrative appeals is a highly labor-intensive process, requiring in almost every case the line-by-line examination of each item of information withheld. It would be imprudent for the Department to "rush" this careful review in an attempt to meet a deadline that is impracticable in most cases in light of the need to retrieve records from and coordinate with field office initial denial authorities, the volume and sensitivity of the records, and the frequent need for a separate classification review. Certainly it could not have been Congress' intent to require agencies to take precipitous action, solely to meet a 20-day deadline, that would risk the disclosure of sensitive, exempt information or deprive administrative appellants of full and impartial adjudications. (In 1987, nearly 30% of our substantive administrative appeals resulted in the disclosure of additional information.) With respect to productivity, I note that, with no increase in staff, the Office of Information and Privacy has increased by 15% the number of administrative appeals adjudicated during the past two years.

4. In your testimony, you suggested that the FOIA might be changed to limit its possible use in circumventing the rules for civil discovery. [Hearing Transcript at 13-16]. The annual AMTRAK authorization bill, S. 2320, was introduced containing an unusual provision that would have exempted AMTRAK from providing any records pursuant to a FOIA request "which are requested for commercial use [...], or which are requested for use in connection with litigation or other legal proceedings." Did you or anyone in the Department of Justice advise AMTRAK to request such a FOIA exemption in its annual authorization? If so, what was the recommendation, when was it given, and by whom?

ANSWER: No, the Department of Justice was not consulted in this matter.

5. The 1986 FOI Reform Act (FOIRA) revised the fee standards to relieve the news media and noncommercial educational and scientific institutions of high fee charges and to recoup more FOIA processing costs from commercial requesters. There can be no doubt that these provisions of the FOIRA were intended to repudiate the restrictive fee waiver provisions of the 1983 memorandum by Assistant Attorney General Jonathan C. Rose (the Rose Memorandum). See Senate Judiciary Committee Report on S. 774 at 11. In view of this, it is disturbing that the Justice Department continues to draw on the Rose Memorandum in training FOIA officers. In particular, your April 1987 memorandum to all agency heads, "New FOIA Fee Waiver Policy Guidance," continues to follow the restrictive philosophy of the Rose Memorandum. Still more disturbing is an incident, brought to the attention of the Subcommittee by the National Coordinating Committee for the Promotion of History, in which the Justice Department, at a FOIA training session conducted after the 1986 amendments became effective and after you had issued the new fee waiver guidance, provided the Rose Memorandum itself to the staff of the National Archives and Records Administration. In how many situations after the 1986 amendments became effective did the Justice Department use the Rose Memorandum to train FOIA officers? What is the Department doing to ensure that the Rose Memorandum is no longer being used?

ANSWER: As is described in my written statement to the Subcommittee (pages 48-50), the revised fee and fee waiver provisions of the FOIA Reform Act were specified to take effect 180 days after enactment (April 25, 1987), but for those provisions to become fully effective under the statute they required implementing regulations which agencies could not practicably promulgate within that time. Consequently, almost all federal agencies were in an "interim period" with respect to fees and fee waivers during mid-1987, during which the Department of Justice and OMB specifically advised agencies to give requesters the full benefits of both the old and the new statutory provisions. See FOIA Update, Winter/Spring 1987, at 2. The Department's new fee waiver

policy guidance memorandum was issued before the April 25 effective date of the new fee waiver provision and was immediately thereafter distributed as a "handout" at all classes as the primary basis for the Department's FOIA training regarding the making of fee waiver determinations. The "Rose Memorandum" was not thereafter "used" by the Department in FOIA training; rather, during mid-1987, it merely was referred to as having been replaced by the new fee waiver policy guidance and as having possible further significance only insofar as requesters were entitled to the benefit of the old as well as the new fee waiver standard during the "interim period." The "Rose Memorandum" was contained in the pre-printed books of FOIA materials used by the Department for its training courses through mid-1987; during the summer of 1987, it was specifically deleted from those training books as they were reprinted for future use and was replaced in the books by the new fee waiver guidance memorandum. The Department has consistently and unequivocally advised federal agencies since the effective date of the new fee waiver provision that its replacement fee waiver guidance should be used and that the "Rose Memorandum" is superseded by it. See also New FOIA Fee Waiver Policy Guidance (Apr. 2, 1987) at 1 n.1, reprinted in FOIA Update, Winter/Spring 1987, at 3 n.1 ("This guidance supersedes the previous fee waiver guidance issued by the Department of Justice in January 1983 ["Rose Memorandum"] and November 1986, and is effective with respect to fee waiver determinations made as of April 25, 1987.").

6. In your testimony, you described the extensive FOIA training that the Justice Department conducts for the federal agencies. However, I do not find references in your discussion to those training materials to guidance on reducing delays, releasing segregable portions of documents, or on facilitating disclosure. Could you identify where in the training materials these goals are discussed?

ANSWER: Throughout the Department of Justice's FOIA training, it endeavors to address all aspects of the Act's administration, including the procedural aspects listed in this question. Its three primary FOIA training programs are: "The Freedom of Information Act for Attorneys and Access Professionals," the basic two-day FOIA training session presented 5-6 times per year; "The Advanced FOIA Seminar," presented twice per year; and "The Freedom of Information Act for Non-Specialists," presented twice per year. (For the Subcommittee's reference, copies of the books of training materials used in each of these three training programs are being forwarded to the Subcommittee.) In the introductory or "overview" presentations made at these training sessions, emphasis is placed upon the Act's disclosure mandates and agency FOIA personnel are reminded that nondisclosure is the exception rather than the rule.

Specific workshops at these training sessions address the legal requirements of delineating exempt from nonexempt information, as well as the procedural aspects of making FOIA disclosures. The Department's basic FOIA training program, for example, includes a workshop entitled "Procedural Guidance," in which the techniques for responding to FOIA requests properly and efficiently are addressed. (The training materials pertaining to this workshop -- which include such items as sample FOIA-response forms and a detailed advisory discussion of the importance of "Communication With Requesters" -- can be found at pages IV-1 through IV-41 of the course materials book.) Other workshops of this basic course deal with the proper application of particular FOIA exemptions: Exemptions 1, 2 & 7, 4, 5, and 6 & 7(C). In each of these workshops, training students are asked to review sample "problem documents" in order to delineate exempt information from that which should properly be disclosed under the Act. (These materials are all identified as such within Section II of the course materials book.) As the workshop instructors review these sample documents with the students, they focus on the segregation of disclosable segments of the documents from those which properly fall within an exemption. (An example can be found at page II-72, an Exemption 5 workshop document in which factual portions have to be segregated for disclosure.) Additionally, the Department's "Advanced FOIA Seminar" contains presentations entitled "FOIA From the Non-Government Perspective" and "The State of the Law on Selected Procedural Issues," as well as a workshop devoted to the discussion of FOIA administrative considerations and to the exchange of ideas on improving the efficiency and effectiveness of FOIA administration. (Materials pertaining to the latter two sessions appear at pages 17-29 of the course materials book.)

7. During the hearing, you and I discussed proper fee categories for educational institutions, libraries and non-profit research institutions. Is there an official position at the Department of Justice on the appropriate fee category for the Heritage Foundation, the Brookings Institution, the National Security Archive, the American Enterprise Institute, the Institute for Policy Studies, or the CATO Institute? If so, when was each position established and by whom? Please indicate the statutory basis for each determination. Has the Department of Justice advised other federal agencies or departments on the appropriate fee category for such non-profit research institutions? If so, what were the recommendations, when were they made, and by whom?

ANSWER: Under the provisions of the Freedom of Information Reform Act of 1986, government-wide policy responsibility regarding the making of "fee category" determinations under the Act was placed in the Office of

Management and Budget, see 5 U.S.C. § 552(a)(4)(A)(i), as enacted by Pub. L. No. 99-570, § 1803 (1986), which exercises this responsibility through its Office of Information and Regulatory Affairs. Accordingly, any official policy position regarding such determinations -- either in general or as to particular FOIA requesters -- is taken by federal agencies in conjunction with OMB, not the Department of Justice. The Department of Justice has not advised other federal agencies regarding the making of such determinations; rather, as was indicated in my written statement to the Subcommittee (page 68), such FOIA policy matters are left to OMB. My written statement further indicated (page 66) that I was including within it a brief discussion of "fee category" matters only due to the fact that OMB was not invited to testify, which led to our discussion of such matters at the hearing.

8. Several writers and scholars have indicated to me that federal agencies have challenged requests for fee waivers, claiming that there is no public interest when material is already available in the requester's subject area. Have you or anyone in the Department of Justice advised a federal agency to make such a determination? Will you advise agencies that such determinations are inconsistent with the FOIA?

ANSWER: The Department of Justice advises federal agencies that, in making decisions on requests for general "public interest" fee waivers under 5 U.S.C. § 552(a)(4)(A)(iii), they should consider whether the information to be disclosed is already available in the public domain, because "[i]f it is, then disclosure of the information would not be likely to contribute to an understanding of government operations or activities, as nothing new would be added to the public record." New FOIA Fee Waiver Policy Guidance (Apr. 2, 1987) at 7, reprinted in FOIA Update, Winter/Spring 1987, at 7 (citing Blakey v. Department of Justice, 549 F. Supp. 362, 364-65 (D.D.C. 1982), aff'd mem., 720 F.2d 215 (D.C. Cir. 1983)). In such matters, the question is not whether the requested information will be disclosed by the agency under the Act, but rather whether the requester or the taxpayer should bear the cost of that disclosure where the information is "already available" to the public.

9. Does the Department of Justice assert that newspapers and other representatives of the news media, such as Mr. Timothy Peek, editor of the Addison County Independent in Vermont, who testified at the Subcommittee's hearing, are ever properly classified as "commercial" requesters? Will you advise agencies that such determinations are inconsistent with the FOIA?

ANSWER: As is stated in response to Question #7, above, the Office of Management and Budget, not the Department of Justice, holds government-wide policy responsibility regarding the proper classification of FOIA requesters as "commercial" requesters under the fee-category structure established by the amended Act. The Department advises other agencies to consult with OMB regarding such "fee-category" matters within OMB's province. I note in this connection, though, that OMB's FOIA fee guidelines specifically provide regarding "representatives of the news media" that "a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use." Uniform Freedom of Information Act Fee Schedule and Guidelines, § 8.c., 52 Fed. Reg. 10011, 10019 (Mar. 27, 1987). Additionally, as regards the making of general fee waiver determinations under 5 U.S.C. § 552(a)(4)(A)(iii), which is within the Justice Department's area of FOIA policy responsibility, the Department's government-wide policy guidance contains a specific presumption that "newsgathering organizations" not be disqualified from a fee waiver on a "commercial" basis. New FOIA Fee Waiver Policy Guidance (Apr. 2, 1987) at 11, reprinted in FOIA Update, Winter/Spring 1987, at 10. A reasonable exception to this would arise only if, for example, a news media organization were to make a FOIA request for records pertaining to a particular business matter (such as an antitrust matter) of its own corporate interest.

10. Did the Army consult you about Charles Piller's request for records on biological weapons testing? Did the Justice Department play any role at all in the government's handling of Mr. Piller's request? If so, what role did it play, and what were its recommendations?

ANSWER: No, the Department of Justice was not consulted in this matter.

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

QUESTIONS OF SENATOR GORDON J. HUMPHREY
TO SUPPLEMENT RECORD OF AUGUST 2, 1988 HEARING
ON FREEDOM OF INFORMATION ACT ISSUES

QUESTIONS FOR STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY

1. My primary concern regarding FOIA oversight is to preserve its beneficial goals of legitimate disclosure of useful government information while avoiding excessive and wasteful expenditures and the inefficient use of hard-pressed government personnel resources. Does the Department have any general or specific suggestions for legislative modifications or improvements of FOIA which would address the problem of cutting excessive and inappropriate expenditure of government funds or personnel resources in complying with FOIA?

ANSWER: I very much share the concern of preserving the beneficial disclosure goals of the Freedom of Information Act while avoiding excessive or inefficient expenditures of government resources. In my testimony before the Subcommittee, I emphasized that striking the appropriate "balance" among such considerations is the major challenge presented in FOIA administration. At this time, however, the Department of Justice does not have a legislative proposal to make regarding the Freedom of Information Act.

2. Your testimony pointed out that FOIA now requires federal agencies to provide government information to agents or citizens of foreign governments, even though the countries of such requesters often do not provide FOIA-type disclosure for citizens of their own countries, let alone to requesters from other countries, including Americans. This imbalanced aspect of FOIA obligations raises serious concerns.

a) Absent a specifically applicable exemption, would a federal agency be required to disclose significant government information to a requester known to be an agent of Libya, Iran, or the Soviet Union even though it is manifest that the information is sought for purposes hostile to U.S. interests?

ANSWER: Yes, in the absence of the legal authority to withhold information requested under the Freedom of Information Act, an agency is required to disclose it to "any person" under the Act. 5 U.S.C. § 552(a)(3).

b) Are existing FOIA exemptions, such as those extending to classified information, certain categories of confidential commercial information, and certain categories of

investigatory records, adequate to protect the Government's interests in preventing exploitation of sensitive but unclassified information by hostile foreign governments and their agents? If not, does the Department have any suggestions as to how the FOIA might be modified to address any inadequacies in that respect?

ANSWER: I share the concern over use of the Freedom of Information Act by foreign requesters under existing law, which might not be adequate to protect United States interests, as I indicated in my written statement submitted to the Subcommittee (pages 12-13). At this time, however, the Department of Justice does not have a legislative proposal to make regarding this issue.

c) In this respect, it might be appropriate to modify FOIA to provide that agency records need not be disclosed to a person who is neither a citizen or a permanent resident alien of the United States, unless he is a national of a foreign country which provides reasonably reciprocal access to government information for its own national and non-nationals. What are your views on the merits and feasibility of such a provision?

ANSWER: As I indicated in my written statement to the Subcommittee (page 13), I am concerned that the Freedom of Information Act can be used by foreign requesters, including requesters from countries that provide no reciprocal information access to United States citizens, and that the American taxpayer bears an inappropriate financial burden in this regard. At this time, however, the Department of Justice does not have a legislative proposal to make regarding this issue.

3. I understand that an organization known as the National Security Archive, headed by a Mr. R. Scott Armstrong, has inundated the Department of Defense with excessive FOIA requests, including over 200 requests in 1987 and over 180 requests through July of 1988 alone. I also understand that the Archive claims entitlement to a "categorical waiver" of FOIA fees and processing costs. I also understand that in 1987 over $1,400 in fees were waived in the "public interest" in favor of the Archive, and that over $1,986 in fees have been so waived in favor of the Archive through July of 1988 alone.

a) Don't these substantial fee waivers for Mr. Armstrong's organization amount to a taxpayer subsidy for its operations and objectives?

ANSWER: Yes, all fee waivers and reductions under the Freedom of Information Act are in effect taxpayer subsidies, to one degree or another.

b) How can the existing criteria for fee waivers and waiver of other processing costs under FOIA be modified so that American taxpayers are no longer required to subsidize the operations and political objectives of such groups?

ANSWER: As indicated above, the Department of Justice at this time does not have a legislative proposal to make regarding the Freedom of Information Act.

c) The issue of repetitive, excessive, and vexatious FOIA requests is a matter of concern to me. Would it be feasible to modify the FOIA (and, in particular, its fee-shifting provisions) so as to establish objective standards -- whether tied to the number of requests, the volume of records sought, or the dollar costs necessitated -- to prevent or restrict excessive and wasteful exploitation of the FOIA?

ANSWER: I share the concern over excessive use of the Freedom of Information Act by some requesters, as indicated in my written statement to the Subcommittee (pages 8-19). At this time, however, the Department of Justice does not have a legislative proposal to make regarding this issue.

d) When a requester qualifies for categorical and/or "public interest" fee and processing waivers, is there any existing limit on the dollar expense or expenditure of personnel time which the agency is required to incur under FOIA requirements? In your view, would it be feasible or appropriate for Congress to set a "cost cap" on the amount of dollars, resources, and personnel time which could be expended in responding to the FOIA requests of individual requesters?

ANSWER: No, I am aware of no existing limit on the dollar expense or expenditure of personnel time which an agency is required to incur under the Freedom of Information Act's requirements. The Department of Justice does not have a legislative proposal to make at this time regarding this issue.

4. Is there presently any systematic and comprehensive accounting mechanism in effect to accurately estimate the total costs (including everything from search processing, reproduction costs, personnel resources, administrative appeals, and FOIA litigation) to the Government of FOIA compliance for all federal agencies and departments? If so, please identify that mechanism or system and, if available, the total costs for FOIA compliance that it estimated for each of the past five years. If no such mechanism or system exists, do you believe that it would be feasible, cost-effective, and appropriate to establish such a FOIA cost-accounting mechanism?

ANSWER: No such mechanism exists for the government-wide calculation of FOIA costs, although most agencies

regularly report their own FOIA costs to Congress annually in accordance with 5 U.S.C. § 552(d). More than five years ago, the General Accounting Office attempted to calculate FOIA costs government-wide, resulting in its estimated annual cost of $61 million, but its efforts were limited by incomplete data. (See my written statement to the Subcommittee, page 19 n.26.) In light of that GAO effort, I am not certain that it would be feasible, cost-effective and appropriate to establish such a mechanism.

5. The increased use of computerized electronic systems for inter- and intra-agency communications by federal agencies and departments could raise significant unforeseen issues under FOIA. For example, inter-office "electronic mail" may now sometimes be used as a substitute for telephonic conversations in various contexts, raising the question of whether such electronic "conversations" result in the creation of an "agency record" within the meaning of FOIA.

a) Does the Department have any concern that this increased use of computerized communication by government agencies may create problems under FOIA (e.g., in terms of the scope of covered "agency records") which were not fully anticipated and addressed when FOIA or its major amendments were enacted? If so, I would appreciate your comments on this issue.

ANSWER: Yes, I share the concern that the increased use of computerized electronic communications by government agencies may create unanticipated problems under the Freedom of Information Act. The Department of Justice is continuing to study this area, but it does not have a legislative proposal to make at this time regarding this subject.

Senator LEAHY. Our next panel is Tim Peek, the editor of the Addison Independent, Middlebury, VT; Paul Maccabee, a journalist from St. Paul, MN; and Charles Piller, the author of "Gene Wars," from Oakland, CA. Gentlemen, if you would come forward, Mr. Peek, Mr. Maccabee, and Mr. Piller, we are glad to have you here.

I normally would question the good judgment of anyone who would leave Vermont this time of the year to come to Washington, but the last few weekends when I have been home, it has been almost as hot up there as down here.

The difference is, if you will allow me just a slight parochial comment, the pollution level is somewhat different. I well remember a friend of mine coming up from Washington and visiting me at my home in Vermont and looking down at the view across the valley and the mountains.

I was saying, isn't this lovely up here, enjoying the fresh air and all. He said, no; he said I could never live in a place where you can't see the air. [Laughter.]

So let us begin, Mr. Peek, with you, and then we will go to Mr. Maccabee and then Mr. Piller, and then I have a series of questions.

STATEMENT OF A PANEL CONSISTING OF TIMOTHY B. PEEK, MANAGING EDITOR, ADDISON COUNTY INDEPENDENT, MIDDLEBURY, VT; PAUL MACCABEE, JOURNALIST, ST. PAUL, MN; AND CHARLES PILLER, JOURNALIST AND AUTHOR, OAKLAND, CA

STATEMENT OF TIMOTHY B. PEEK

Mr. PEEK. Thank you, Mr. Leahy. I appreciate you inviting me down here.

Senator LEAHY. Pull the microphone just a little bit——

Mr. PEEK. A little bit closer than that?

Senator LEAHY. Yes, right.

Mr. PEEK. OK.

My name is Tim Peek. I am managing editor of the Addison County Independent. We are a general circulation newspaper based in Middlebury, VT. We have a circulation of about 9,000 and we reach virtually all the citizens of the area, about 30,000 people in the county.

I am a fairly frequent user of the Freedom of Information Act, having filed probably three dozen requests over the last 6 years. Recently, though, I have found that at least one government agency has closed its door to requests from individuals in smaller media outlets through overly strict and twisted interpretation of fee waiver requirements.

In October of 1987, I requested information under the FOIA about U.S. Government security agency recruiting and work activity at Middlebury College, a prominent school in our community with a history of contact with the CIA and other national security agencies.

I requested documents pertaining to three areas, recruiting or interviewing activity for prospective employees at the college, grants or contract work given to professors, and intelligence-gathering operations at the college.

The CIA responded that the agency may have documents responsive to the request, but would require my commitment to pay all search, review, and copying fees before the search would be conducted. The officer responding estimated the cost at $600 or above.

The agency denied my fee waiver, despite my request for one that release of information would be in the public interest. This was a highly unusual and precedent-setting response, I believe, and that is why I am here.

In his December 8, 1987, letter in response to my FOIA request, CIA Information and Privacy Coordinator Lee S. Strickland denied my request for a fee waiver on the grounds provided in 32 CFR 1900, the CIA's regulations governing how it will interpret the FOIA.

The amended rules define members of the news media as

> Any person actively gathering news for a United States entity that is organized and operated to publish or broadcast news to the United States public. The terms "news" means information that is about current events or would be of current interest to the public.

That rule also states that:

> Records will be furnished without charge or at a reduced rate whenever the coordinator determines that a waiver or reduction is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the United States government and is not primarily in the commercial interests of the requestor.

Despite these rules and definitions, Mr. Strickland determined that:

> Although you are an editor of the Addison Press, Inc., the information you seek does not meet the regulatory requirements of current events or information that would be of current interest to the general public. Therefore, you will be responsible for search, review, and reproduction fees, as described in the enclosed fee schedule.
>
> With respect to your request for a fee waiver, I have reviewed your FOIA request and have determined that the portion of information you seek from agency files for which a search may be conducted would not contribute significantly to the public understanding of the operation or activities of the United States government. Accordingly, in this instance, fees must be charged as described above.

I believe this determination sets a dangerous precedent for two reasons. First, the standards the CIA has set for "information that would be of current interest to the general public" must be very, very high if the agency has determined that this information did not meet those requirements.

At the time I made the request, CIA recruiting on the Middlebury College campus was a hot political issue. Middlebury College is the second largest employer in Addison County and its actions are of interest to many people. By any definition, CIA recruiting activity at the college was a hot news story.

Despite this, the CIA determined that "the information you seek does not meet the regulatory requirements of current events or information that would be of current interest to the general public."

The second and perhaps more ominous aspect of the CIA's denial of a fee waiver is that in making its determination of the newsworthiness of the material requested, the agency has reached into my news room to decide what is news. No government agency has the right to tell a newspaper what would be of current interest to the general public.

Not only are the agencies unqualified to make these determinations, as this case amply demonstrates, but to allow them to do so infringes on first amendment guarantees to a free and unfettered press.

I cannot stress enough how important it is to keep government agencies out of the news room. In this case, a bureaucrat at the CIA has denied the 30,000 citizens of Addison County the opportunity to find out about government activity at the county's second largest employer. This is a prime example of government censorship.

Mr. Strickland wrote that release of the information would not contribute significantly to the public understanding of the operation or activities of the U.S. Government. If release of information about how a government agency recruits employees from a local school and what government work is being conducted in a community would not contribute to an understanding of government operations, what would?

It seems the agency has set standards so strict as to bar fee waivers for virtually all information. The agency might argue that the simple denial of a fee waiver should not interfere with a newspaper's right of access to government documents. This may be true for large newspapers with plenty of money to spend on lawyers to fight for fee waivers. But for papers like the Addison Independent, and there are thousands of them across the Nation, fee waivers mean the difference between access and no access.

In this instance, the CIA effectively blocked my paper's access to these documents. Mr. Strickland estimated the cost of my request at $600 or more. This is more than I spend on all freelance work in 1 year. It is too high a price to pay for information that may or may not exist and may or may not turn out to be useful in a story.

Some of the people appearing before the committee today have battled through long and expensive appeals to gain access to government documents. That is simply not an option for my paper and virtually all of the nonmetropolitan papers in the Nation.

For me, the FOIA process ended when Mr. Strickland denied the information I sought and said it was not newsworthy enough to win a fee waiver. The key point here is that I never even had the chance to find out if there was any information that Addison County residents would be interested in. In this instance, the CIA was the editor.

By effectively denying individuals in smaller media outlets access to the information through denial of fee waivers, the CIA is in the enviable position of being able to say that all of its records are available to the public because access has never actually been denied. The catch is that the price of access if prohibitively high for all but the wealthy.

Senator LEAHY. Mr. Peek, only because I am afraid on time, we will put your full statement in the record, as well as, I would assume, the letters you would want.

Mr. PEEK. Yes. If I could just state in closing——

Senator LEAHY. Sure.

Mr. PEEK [continuing]. That the determination of fees is just as important as the actual access to documents and release of information, and therefore I would urge this subcommittee to look very

closely at how fee waivers are conducted because that is what is going to govern what information reaches the public.

Thank you very much.

[The prepared statement of Mr. Peek, including correspondence, follows:]

TESTIMONY OF TIMOTHY B. PEEK
BEFORE THE SENATE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
AUG. 2, 1988

My name is Tim Peek. I am managing editor of the Addison County Independent, a twice-weekly general circulation newspaper serving the Addison County region of Vermont. With a circulation of 9,000, we reach virtually all households in the area.

As a frequent user of the Freedom of Information Act (FOIA), I find it an indispensable tool for doing high-quality, factually correct reporting on a variety of issues of interest to our readers.

I have used the FOIA for articles on hydroelectric generating plant proposals in our community, to assess the cleanliness and legitimacy of a local slaughterhouse, to gather biographical data on prominent citizens who are now dead. Over the past six years I have filed on the order of 40 requests under the FOIA.

Recently, though, I have found that at least one government agency has closed its doors to requests from individuals and smaller media outlets through overly strict and twisted interpretations of fee waiver regulations.

In October of 1987 I requested information under the FOIA about U.S. government security agency recruiting and work activity at Middlebury College, a prominent school in our community with a history of contact with the Central Intelligence Agency, National Security Agency and other government agencies. I filed FOIA requests with the CIA, NSA and Defense Intelligence Agency.

I requested documents pertaining to three areas (see attached copy of request letter):

"1. Recruiting or interviewing activity for prospective... employees at Middlebury College... of either students, professors or other staff. This includes recruitment activity both on campus and at other locations.

"2. Grants or contract work given to professors or other staff at Middlebury College or to the college itself.

"3. Intelligence-gathering operations at Middlebury College or involving college students or employees."

The DIA responded Nov. 23, 1987, that it did not have any documents responsive to the request (See attached DIA response letter).

The NSA responded Nov. 25, 1987, that it would search for documents responsive to the request. I have heard nothing from the agency in the eight months since (See attached NSA response letter).

The CIA responded Dec. 8, 1987, that the agency may have documents responsive to the request but would require my commitment to pay all search, review and copying fees before the search would be conducted. The officer responding estimated costs at more than $600.

The agency denied my fee waiver, despite my request for one in my FOIA request. In that request I wrote:

"I am prepared to pay search and copying costs up to $40 for locating and reproducing the requested material but request that you waive any such fees under the provision of the FOIA that permits you to waive or reduce copying and search fees when release of the requested information would be 'in the public interest.' This material will be used in newspaper articles for general public education; I believe this use fulfills the requirements for waiving fees."

In a highly unusual and precedent-setting response, the agency decided I would not be eligible for a fee waiver. It is this response to my request for a fee waiver that brings me before you today.

In his Dec. 8, 1987, letter in response to my FOIA request (see attached copy of CIA response letter), CIA Information and Privacy Coordinator Lee S. Strickland denied my request for a fee waiver on the grounds provided in 32 CFR Part 1900 as amended in 1987, the rules governing the CIA's handling of public access to documents.

The key provisions of the 1987 amendments were to cut down on the fee waivers allowed to commercial requesters as defined in §1900.3(n) and to allow more fee waivers to the media, non-commercial and educational requesters, as defined in §1900.3 (o)(p)(q).

The amended rules define members of the news media as "any person actively gathering news for an United States entity that is organized and operated to publish or broadcast news to the United States public. The term 'news' means information that is about current events or that would be of current interest to the public." (§1900.3(q))

The rule also states that "Records will be furnished without charge or at a reduced rate whenever the Coordinator determines that a waiver or reduction is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the United States government and is not primarily in the commercial interest of the requester."

Despite these rules and definitions, Mr. Strickland determined that:

"Although you are an editor of The Addison Press, Inc., the information you seek does not meet the regulatory requirement of current events or information that would be of current interest to the general public. Therefore, you will be responsible for search, review and reproduction fees as described in the enclosed fee schedule...

"With respect to your request for a fee waiver, I have reviewed your FOIA request and have determined that the portion of information you seek from Agency files for which a search may be conducted would not contribute significantly to the public understanding of the operation or activities of the United States Government. Accordingly, in this instance, fees must be charged as described above."

I believe this determination sets a dangerous precedent for two reasons.

First, the standards the CIA has set for "information that would be of current interest to the general public" must be very, very high if the agency determined this information did not meet the requirements.

At the time I made the request, CIA recruiting on the Middlebury College campus was a hot political issue. Students and faculty had demonstrated repeatedly both for and against the CIA presence on campus. The college administration had issued new rules for CIA activity at the school. William Odom, director of the National Security Agency and a recent appointee to the school's board of trustees, was in the news with statements about prosecuting journalists for reporting secret information.

The Middlebury College student newspaper and my paper had covered these issues but there had been no in-depth explanation of the facts.

When filing my request, I wanted to gather the information that would allow me to detail the college's connections with the intelligency community. It was widely suspected that because of the college's strong language and foreign affairs programs that the school was a prime recruiting ground for intelligency agencies.

Middlebury College is the second-largest employer in Addison County and its actions are of interest to many people. By any definition, CIA recruiting activity at the college was a "hot" news story. Despite this, the CIA determined "the information you seek does not meet the regulatory requirement of current events or information that would be of current interest to the general public."

The second, and perhaps more ominous, aspect of the CIA's denial of a fee waiver is that in making its determination of the

newsworthiness of the material requested, the agency has reached into my newsroom to decide what is news.

No government agency has the right to tell a newspaper what "would be of current interest to the general public."

Not only are the agencies unqualified to make these determinations (as Mr. Strickland's ruling in this case amply demonstrates) but to allow them to do so infringes on First Amendment guarantees to a free and unfettered press.

I cannot stress enough how important it is to keep government agencies out of the newsroom. In this case, a bureaucrat at the CIA has denied the 30,000 citizens of Addison County the opportunity to find out about government activity at the county's second-largest employer. This is a prime example of government censorship.

Mr. Strickland wrote that release of the requested information "would not contribute significantly to the public understanding of the operation or activities of the United States Government."

If release of information about how a government agency recruits employees from a local school and what government work is being conducted in a community would not contribute to an understanding of government operations, what would? It seems the agency has set standards so strict as to bar fee waivers for all information.

The agency might argue that the simple denial of a fee waiver should not interfere with a newspaper's right of access to government documents. This may be true for large newspapers with plenty of money to spend or lawyers to fight for fee waivers, but for papers like the Addison Independent — and there are thousands of them across the nation — fee waivers mean the difference between access and no access.

In this instance, the CIA effectively blocked my paper's access to these documents. Mr. Strickland estimated the cost of my request at more than $600. This is more than I spend on all freelance work in one year. It is too high a price to pay for information that may or may not exist and may or may not turn out to be useful in a story.

Some of the people appearing before the committee today have battled through long and expensive appeals to gain access to government documents. That is simply not an option for my paper and virtually all of the non-metropolitan papers in the nation. For me, the FOIA process ended when Mr. Strickland decided the information I sought was not newsworthy enough to win a fee waiver.

The key point here is that I never even had the chance to find out if there was any information that Addison County residents would be interested in. In this instance, the CIA was the editor.

By effectively denying individuals and smaller media outlets access to information through denial of fee waivers, the CIA is in the enviable position of being able to say all its records are available to the public because access has never actually been denied. The catch is that the price of access is prohibitively high for all but the wealthy.

The determination of fees is much more than an administrative detail. For small users, it cuts to the heart of the access question. Therefore, the rules governing determination of fees and fee waivers should be as strict and as biased in favor of disclosure as the disclosure regulations themselves.

I believe the CIA's FOIA fee waiver regulations are fatally flawed because they allow the agency to determine who is engaged in a worthwhile pursuit of public information and what is newsworthy. When given the chance to determine what should become public information, these agencies will decide according to their own best interests.

One of the things that made the FOIA such a fine law was that it took this discretion of release away from the government. But through the fee determination regulations, government agencies have regained this discretion and are abusing it.

Until government agencies are required to grant fee waivers to all non-commercial requesters, the FOIA will not realize its stated purpose of opening government to all citizens.

The Addison Press, Inc.
P.O. Box 31 Middlebury, Vermont 05753 (802) 388-4944

ANGELO S. LYNN
Editor - Publisher

Oct. 29, 1987

John Wright
Information and Privacy Coordinator
Central Intelligence Agency
Office of Information Services
Washington, D.C. 20505

Dear Mr. Wright:

This is a request for documents under the Freedom of Information Act as amended (Title 5, U.S. Code, Section 552).

I wish to obtain copies of all memoranda, correspondence, studies, reports, financial records or other documents pertaining to the following areas:

1. Recruiting or interviewing activity for prospective CIA employees at Middlebury College in Middlebury, Vt, of either students, professors or other staff. This includes recruitment activity both on campus and at other locations.
2. Grants or contract work given to professors or other staff at Middlebury College or to the college itself.
3. Intelligence-gathering operations at Middlebury College or involving college students or employees.

Specifically, I wish to view documents that detail the nature and extent of recruiting activity at Middlebury College — how often recruiters or other CIA employees visit the campus, evaluations of the college, its programs, faculty and students. I also request access to data that shows work performed for the CIA by Middlebury College employees or students and other payments made to the college or its personnel and students. I also wish to obtain releasable information detailing intelligence operations at the college — including the college's foreign programs and overseas offices.

If all or any part of my request is denied, please list the specific exemption(s) on which you are relying to withhold the information. For any "classified" material withheld, please include the classification, identity of the classifier, date or event for automatic declassification, classification review, or downgrading and, if applicable, the identity of the official authorizing extension of automatic declassification or review past six years and the reason for extended classification. If any part of this request is denied, please inform me as to my rights of appeal under the law and the name and address person to whom that appeal should be sent.

If you determine that portions of the requested material are exempt from release, I will expect, as the FOIA requires, that you provide me with the remaining, non-exempt portions.

I am prepared to pay search fees and copying costs up to $40 for locating and reproducing the requested material but request that you waive any such fees under the provision of the FOIA that permits you to waive or reduce copying and search fees when release of the requested information would be "in the public interest." This material will

be used in newspaper articles for general public education; I believe this use fulfills the requirements for waiving fees. If you determine otherwise, please notify me of the costs before filling my request.

As provided by the amended FOIA, I will expect a reply within 10 working days. If you have any questions concerning this request, please call me at 802-388-4944.

Sincerely,

Tim Peek, editor

DEFENSE INTELLIGENCE AGENCY

WASHINGTON, D.C. 20340-

U-5,378/RTS-1

23 November 1987

Mr. Tim Peek
Editor
The Addison Press, Inc.
P.O. Box 31
Middlebury, Vermont 05753

Dear Mr. Peek:

This is in response to your request under the Freedom of Information Act dated 29 October 1987 in which you requested information concerning DIA recruiting efforts at Middlebury College.

Upon review of DIA's systems of records, it has been determined this Agency has no information on the subject of your request.

Sincerely,

ROBERT C. HARDZOG
Chief, Freedom of Information and
Privacy Act Staff

NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000

Serial: J9484

25 NOV 1987

The Addison Press, Inc.
ATTN: Tim Peek
P.O. Box 31
Middlebury, Vermont 05753

Dear Mr. Peek:

This is to acknowledge receipt of your Freedom of Information Act request of 29 October 1987 for all information pertaining to recruiting or interviewing at Middlebury College, grants or contract work awarded the college or its professors and intelligence gathering operations at the college.

Please be advised that NSA is charged with a foreign intelligence mission and would, therefore, not have intelligence information regarding Middlebury College. We are processing items 1 and 2 of your request and will respond as soon as possible.

Sincerely,

Rona L. Lerner

RONA L. LERNER
FOI/PA Officer

Central Intelligence Agency

Washington, D.C. 20505

Tim Peek, Editor
The Addison Press, Inc.
P.O. Box 31
Middlebury, VT 05753

08 DEC 1987

Reference: F87-1372

Dear Mr. Peek:

Your letter dated 29 October 1987 requesting documents under the provisions of the Freedom of Information Act has been received in the office of the Information and Privacy Coordinator. Reference Number F87-1372, cited above, has been assigned for identification purposes.

Specifically, you are requesting documents pertaining to the following areas:

1. Recruiting or interviewing activity for prospective CIA employees at Middlebury College in Middlebury, VT, of either students, professors or other staff to include recruitment activity both on campus and at other locations.

2. Grants or contract work given to professors or other staff at Middlebury College or to the college itself.

3. Intelligence-gathering operations at Middlebury College, including the college's foreign programs and overseas offices.

In reference to Items 1 and 2 of your request, we can conduct a search for records which might reflect an open or otherwise acknowledged Agency affiliation, if they exist, such as correspondence dealing with recruitment literature and visits, the passage of overt materials to the school, and the like. However, to the extent that Items 1 and 2 of your request seek records that would reveal a confidential or covert connection between CIA and the subject of your request, I must inform you that the CIA can neither confirm nor deny any confidential or covert relationship, or interest in developing such a relationship, with any particular individual, organization, or other entity. Records disclosing this type of information necessarily would be classified pursuant to Executive Order 12356. Further, the fact of the existence or nonexistence of such records would relate directly to information concerning intelligence sources and methods which, in accordance with subsection 102(d)(3) of the National Security Act of 1947 and section 6 of the CIA Act of 1949, the Director of Central Intelligence has the legal responsibility and obligation to protect from unauthorized disclosure.

Therefore, to the extent that Items 1 and 2 of your request might concern records containing such information, it is denied pursuant to FOIA exemptions (b)(1) and (b)(3). An explanation of these exemptions is enclosed.

In reference to Item 3 of your request, the CIA may neither confirm nor deny the existence or nonexistence of responsive records. Such information unless, of course, it has been officially acknowledged, would be classified for reasons of national security under Executive Order 12356. The fact of the existence or nonexistence of such records would also relate directly to information concerning intelligence sources and methods. The Director of Central Intelligence has the responsibility and authority to protect such information from unauthorized disclosure in accordance with subsection 102(d)(3) of the National Security Act of 1947 and section 6 of the CIA Act of 1949. Therefore, Item 3 of your request is denied under FOIA exemptions (b)(1) and (b)(3).

The CIA official responsible for the determinations referred to above is Lee E. Carle, the Directorate of Operations Information Review Officer. By this action we are neither confirming nor denying the existence or nonexistence of such records.

You may appeal this decision by addressing your appeal to the CIA Information Review Committee, in my care. Should you choose to do this, please explain the basis of your appeal. However, it would seem more reasonable for you to wait until our final response to you has been made before you decide whether to appeal.

As you are aware, the FOIA authorizes federal agencies to collect fees for records services. Although you are an editor of The Addison Press, Inc., the information you seek does not meet the regulatory requirement of current events or information that would be of current interest to the general public. Therefore, you will be responsible for search, review and reproduction fees as described in the enclosed fee schedule.

In accordance with section (e) of the schedule, search fees are assessable even if no records are found or, if found, we determine that they are not releasable. This means you will be charged even if our search results are negative or if it is determined that no information is releasable under the FOIA.

Therefore, before we can begin processing Items 1 and 2 of your request as described in paragraph 3 above, we must receive your commitment to pay all fees incurred and under the conditions stated above. The search fees for each item in a request are usually about $200. A more precise estimate can be obtained if you wish.

With respect to your request for a fee waiver, I have reviewed your FOIA request and have determined that the portion of information you seek from Agency files for which a search may be conducted would not contribute significantly to the public understanding of the operations or activities of the United States Government. Accordingly, in this instance, fees must be charged as described above.

No further action will be taken on your request until you inform us of your agreement to pay fees as described above. Further, we will require a 50% deposit of the estimated fees. Please send your check or money order to me made payable to the Treasurer of the United States citing F87-1372 to ensure proper credit to your account.

Sincerely,

Lee S. Strickland
Information and Privacy Coordinator

Enclosure

Senator LEAHY. Mr. Maccabee, we are going to vote, but let us start with your testimony and if I have to cut you off at some point, we will just suspend while I go to vote.

STATEMENT OF PAUL MACCABEE

Mr. MACCABEE. Thank you. Mr. Chairman and members of the Subcommittee on Technology and the Law, my name is Paul Maccabee and I am a writer from St. Paul, MN. I want to thank you for the opportunity to testify on my experiences seeking information for a book on organized crime through the Freedom of Information Act.

Seven years ago, as an investigative reporter with the Twin Cities Reader newspaper, I filed the first of what would become dozens of FOIA requests, and these files requested would help me document the relationship between mobsters and public officials in Minnesota.

The book will cover such legendary gangsters as Alvin "Creeps" Karpis and John Dillinger, so public interest towards the book has been extensive. Among the prominent Minnesotans who sent the Justice Department letters supporting a fee waiver in the public interest have been the mayor of Minneapolis, the chief of the Minneapolis Police, the attorney general for the State of Minnesota, the Minnesota Public Safety Commissioner, and Minnesota Senator David Durenberger.

But in spite of this, the Justice Department has responded with long delays in processing files, even longer delays in administering fee waivers, and massive deletions in documents that have made it impossible for me to give Minnesota citizens access to their own history.

Allow me to share three brief examples of the Justice Department's noncompliance with the act. The first is delays in responding to fee waivers. In 1983, the FBI denied my request for a complete waiver of fees for about 60 FOIA requests.

In 1984, I appealed to the Office of Legal Policy asking it to overturn the FBI in the public interest. Four years passed before the Justice Department responded to my fee waiver appeal, more than 1,300 days of delay.

I was forced to turn to the assistance of Congressman Bruce Vento and Senator David Durenberger, both of whom repeatedly

wrote and telephoned the Justice Department to demand again and again that the agency cease its delays. Both Vento and Durenberger urged a complete fee waiver due to the public interest. Last February, the Justice Department finally responded, denying me a full fee waiver 4 years after the appeal had been filed.

Second, delays in processing the actual files themselves. When I have offered to pay for files, delays in processing them has extended years beyond the FOIA time limits. It took the FBI almost 2 years to process barely 63 pages on gangster Tommy Banks of Minneapolis. That averaged out to more than 10 days of delay for every page released.

Finally, third, improper deletions from those files. The FBI and other agencies have released thousands of pages to me under the FOIA. Most often, even when the individuals are long dead, and most of them are, the FBI deletes 75 to 90 percent of the material that they release to me.

Often, only the markings and the page numbers are visible.

It is of special interest that the Department of Justice has deleted hundreds of pages that discuss the relationship between public officials and mobsters. Now, government corruption is the subject at the heart of my book, and it is also of tremendous public interest.

For example, among the material that the FBI has deleted from the files are the names of public officials who took bribes from mobsters, the names of police officers who take payoffs, and the names of aldermen and alderwomen and other politicians who were literally purchased through bribes.

One final example shows how whimsical these deletions have been. The FBI deleted from an FBI letter the names of the mayor of Minneapolis and the mayor of St. Paul. The FBI claimed the deletion of that paragraph because it would violate their privacy and reveal the identity of confidential informants.

The end result of that kind of egregious noncompliance by the Justice Department has been that my readers, the ultimate beneficiaries of this book, have been denied the opportunity to learn about this valuable portion of their own history.

Unless the Justice Department begins to comply with the FOIA, my book will not be written. The only people pleased by that result will be organized crime.

Thank you, Mr. Chairman, for this opportunity to testify and, of course, I would be delighted to take questions.

[The prepared statement of Mr. Maccabee follows:]

TESTIMONY OF PAUL MACCABEE
BEFORE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
COMMITTEE ON THE JUDICIARY

AUGUST 2, 1988

Mr. Chairman and members of the Subcommittee on Technology and the Law; my name is Paul Maccabee. I'm a journalist from St. Paul, Minnesota. I want to thank you for the opportunity to testify on my experiences seeking information on organized crime through the Freedom of Information Act (FOIA).

I'd like to summarize the Justice Department's response to my filing dozens of FOIA requests and appeals during the last seven years. The request for these files under the FOIA was undertaken to provide the public with the first comprehensive history of organized crime in Minnesota.

My first FOIA requests for documents on organized crime figures were filed in 1981. The Justice Department has responded to those requests with deletions of material that should be releasable under the FOIA, very narrow interpretations of fee waiver provisions, and lengthy delays in processing files and administering appeals. In one case, the Justice Department delayed responding to a fee waiver appeal for 1,350 days.

As a result of the Justice Department's actions, I have been unable to obtain most of the documents that would enable me to write a book on syndicate crime that seems to be of tremendous public interest. Most importantly, my readers have been denied the opportunity to learn about the influence that organized crime has had in Minnesota.

Allow me to share my background with you. When I began my research, I was a reporter for the weekly Twin Cities Reader newspaper in Minneapolis - where I received the state's highest award for journalistic excellence, the Society of Professional Journalists-Minnesota Chapter "Page One" Award. I am a member of both the Society of Professional Journalists and Investigative Reporters and Editors. I have published more than 120 articles and columns in local and national daily newspapers, weekly magazines, and monthly publications.

I have been called by the Wall Street Journal "an aggressive young reporter always alert to offbeat angles in his stories." The American Society of Journalists and Authors refers to me as "a reliable, conscientious and experienced journalist who has written extensively on" organized crime topics.

ARBITRARY DENIAL OF FEE WAIVER REQUESTS:

In January 1983, I asked the Federal Bureau of Investigation to issue a complete waiver of what ultimately would become more than $1,800 in fees for approximately 59 FOIA requests for FBI files on gangsters in Minnesota. Four months later, the FBI denied my fee waiver request, claiming that release of these historic documents "will not...result in primary benefit to the general public."

In response, on March 2, 1984 I filed a fee waiver appeal with the Justice Department's Office of Legal Policy to overturn the FBI's fee waiver denial.

Four years would pass until the Justice Department responded to my appeal - more than 1,300 days after the fee waiver appeal was filed.

In an effort to speed up the Justice Department's decision on my appeal, I supplied the Office of Legal Policy with letters from the nation's leading history, journalism and law enforcement experts urging a complete waiver of fees.

Among the authorities who vouched for the strong public interest in these crime files and urged the Justice Department to grant a 100 percent fee waiver: The Society of Professional Journalists, The Reporters Committee for Freedom of the Press, Chicago Crime Commission, American Society of Journalists and Authors, Minneapolis History Collection, Center for Investigative Reporters, Ramsey County Historical Society, Minnesota Attorney General Hubert H. Humphrey III, Senior Research Fellow Lucile Kane of the Minnesota Historical Society, Community Crime Prevention, Minnesota Public Interest Research Group, Minneapolis Police Chief Anthony Bouza, Minneapolis Mayor Donald Fraser, U.S. Congressmen Bruce Vento and Martin Sabo, Bloomington Citizens Crime Prevention Association, and U.S. Senator David Durenberger.

Minneapolis Police Chief Anthony Bouza wrote the Justice Department: "I

Prepared testimony of

Charles Piller

Journalist and Co-author of

Gene Wars:
Military Control over the New Genetic Technologies

Before the U.S. Senate Judiciary Committee,
Subcommittee on Technology and the Law

Oversight Hearing on the Freedom of Information Act

August 2, 1988

am writing to recommend cooperation with this effort undertaken by Paul Maccabee and, because of its value to the public, to urge a waiver of the fees normally associated with such requests. Fundamentally, the proposal to do a book on organized crime fills a real public need."

Minnesota Attorney General Hubert H. Humphrey III confirmed the public interest in the release of these Justice Department files, arguing that this "research project could be an invaluable tool for other researchers and historians, as well as the citizens of Minnesota who are interested in the topic."

The Executive Director of the Ramsey County Historical Society confirmed: "The book for which (Maccabee) is conducting this research will make a contribution of national importance in understanding a period that left a lasting mark on the American consciousness." Concluded the Center for Investigative Reporting: "Denying Maccabee a fee waiver in the release of these documents would seriously harm the public interest."

The subjects of this book are of intense public interest - including bankrobber John Dillinger, kidnapper Alvin "Creepy" Karpis, then-Minneapolis Mayor Hubert H. Humphrey, Kate "Ma" Barker, "Pretty Boy" Floyd, J. Edgar Hoover, and many others. The events covered in the book are also of tremendous public interest - the war by Mayor Hubert H. Humphrey against organized crime, the infamous kidnapping of Edward Hamm by Alvin "Creepy" Karpis and Ma Barker, the Teamsters Union racketeering directed by the Minnesota associates of union boss Jimmy Hoffa, and much more.

The Justice Department responded to my fee waiver appeal by requesting that I provide documentation proving the relevance of these files to the book. In 1985, I prepared 17 pages of single-spaced memoranda showing why these records were crucial to the accuracy of my history book.

I took care to ensure that this series of FOIA requests, although extensive, would not burden the Justice Department. Many of the FOIA requests pertained to a mere handful of documents. For instance, my request for files on Minneapolis gambling king Louis Hecht encompassed 20 pages and my request for files on Irish mobster Jack Keavy involved only five pages.

In January 1983, I significantly narrowed the size of my FOIA requests by thousands of pages so as to make the requests more manageable for the

Justice Department. For instance, I narrowed my request for files on organized crime associate Morris Roisner from 7,494 pages down to a total of 194 pages.

Between January and May 1983, I reduced the number of files I'd requested under the FOIA so dramatically that the fees requested by the Justice Department dropped by almost 50 percent from $3770.60 to $1,828.70.

I informed the Justice Department that the FBI and other agencies could further narrow my requests by deleting pages of files that consisted primarily of newspaper clippings.

Throughout 1984, the Justice Department declined to respond to my fee waiver appeal. In July 1985, the Office of Legal Policy sent me a letter which promised that any delays in processing the appeal would take only "several weeks."

Throughout 1985, the Justice Department declined to respond to my fee waiver appeal.

In an effort to prod the Justice Department into responding, I mailed letters to the Office of Legal Policy's Richard Huff requesting information on the delays. The Justice Department received letters from me dated March 17, May 27, July 23, August 4 and September 2, 1984; May 9, June 21, July 13, September 12, September 24, October 3, and November 17, 1985; March 25 and April 14, 1986, and January 9, 1987.

My letters went unanswered, except for receipt of a form letter which failed to address the substance of any appeal. Again, throughout 1987 the Justice Department did not respond to my fee waiver appeal.

In a March 25, 1986 letter to the Justice Department, I pleaded "again and again, I urge your office to immediately obey federal law and issue a fee waiver decision. If your office has no intention of obeying FOIA law, then please notify me of this fact so that my attorneys may proceed with action against you and your office." I did not receive a response from the Justice Department.

In my January 9, 1987 letter to the Office of Legal Policy, I again asked: "As your office's unconscionable delay stretches into its third record-breaking year, I again ask you to comply with federal law and make

an immediate determination in this case...surely, after almost three years of stone-walling, it is time to end these delaying tactics and obey the law."

Again, I did not receive a response from the Justice Department.

On May 3, 1987, I spoke by telephone with Richard Huff of the Office of Legal Policy - requesting information on how long the delays would continue. Mr. Huff promised that his staff would "immediately" call me back.

However, no one from his staff made that return call.

I turned to members of the U.S. Congress and the U.S. Senate for assistance. In July 1987, Congressman Bruce Vento wrote the Justice Department asking them to explain the delays. The Justice Department responded in writing on August 18, 1987, promising the Congressman that the fee waiver appeals would "be adjudicated by the middle of October." Yet the Justice Department did not honor that promise to Congressman Vento - throughout October and November and December, the Justice Department did not respond to my appeals.

On December 7, 1987, U.S. Senator David Durenberger wrote the Office of Legal Policy protesting the Justice Department's continuing delays. His staff then telephoned the Office directly, demanding an explanation for the delays. A week later, Congressman Vento again wrote the Office of Legal Policy asking that the delays cease and a decision on the appeal be rendered at last.

Still, the Justice Department did not respond to the appeals.

Finally on March 10, 1988, Senator Durenberger wrote Stephan Markman about the 45 months of delay, threatening to investigate the option of having the Office of the Special Counsel of the Merit Systems Protection Board pursue disciplinary action against Markman's office. In addition, Senator Durenberger threatened to require Markman to appear before the government operations and information committees of the Senate to explain his reasons for refusing to comply with FOIA law. Once again, Senator Durenberger reiterated his suggestion that the Justice Department issue a 100 percent fee waiver in this case.

On February 29, 1988, the Justice Department acted - denying a full fee waiver and authorizing only a 50 percent waiver of fees. Even while denying a full fee waiver, the Office of Legal Policy admitted that "it is evident that these records pertaining to organized crime figures and organizations in Minnesota reflect the operations or activities of the government and that you have demonstrated an intent and ability to disseminate the requested information to the general public."

As of this morning's hearing, I've agreed to pay for FBI processing of approximately 22 of the smaller FOIA requests (about 625 pages) so as to be able to begin writing my book. I do intend to file suit in U.S. District Court against the Justice Department to overturn the denial of a full fee waiver.

Unfortunately, the Justice Department's long delays and ultimate denial of this fee waiver appeal is not an isolated case.

For instance, it took more than 455 days for the Office of Legal Policy to make a determination on a fee waiver appeal with the Executive Office for U.S. Attorneys pertaining to 1,000 pages of files on deceased gangster Isadore Blumenfeld - the "Godfather of Minnesota."

The original fee waiver denial by the Executive Office for U.S. Attorneys was itself delayed for almost two years before a decision was reached (the fee waiver request was filed in July 1984 and substantially denied in February 1986, authorizing merely a 20 percent reduction in fees).

I had filed an FOIA fee waiver appeal in October 1986 with the Office of Legal Policy, asking that they overturn the Executive Office for U.S. Attorneys' denial of a fee waiver. Months passed, with no response. In June 1987, the Office of Legal Policy promised a response "in several weeks."

First weeks, then months passed, without a response from the Justice Department.

In January 1988, after a delay of more than 14 months, the Office of Legal Policy authorized a 50 percent fee reduction - even though the Office admitted that Blumenfeld's files "reflect the operations or activities of the government and that you have demonstrated an intent and ability to disseminate the requested information to the general public."

An indication of how capricious these fee waiver denials are is reflected in the fact that that the original justification by the Executive Office for US Attorneys for the denial was different from the justification for the subsequent denial of a fee waiver appeal by the Office of Legal Policy. The Executive Office claimed that "due to the sensational nature of organized crime and its participants, you stand to gain personal benefit by the publishing of your book."

The Office of Legal Policy, on the other hand, justified a fee waiver denial under the claim that only "half of the releasable information would contribute significantly to public understanding" government operations and activities. I will be suing the Department of Justice in U.S. District Court to overturn its denial of a complete fee waiver.

Similarly, it took the Justice Department 880 days of delay to respond to an appeal of the FBI's denial of a fee waiver for 3,041 pages of files on deceased Minneapolis hitman Jack Apple. After the FBI denied my request for a complete waiver of fees for Apple's files (authorizing a mere 20 percent reduction), I filed an appeal with the Office of Legal Policy on June 19, 1984.

For months, the Office of Legal Policy did not render a decision on the appeal. The Office even refused to respond to letters requesting notification as to why the delays were dragging on. In July 1985, more than a year after the filing of the Jack Apple appeal, the Office warned that additional delays of "at least several weeks" could be expected.

After 29 months of delay, on November 19, 1986 the Office upheld the FBI's denial of a complete waiver of fees. The Office claimed that "much of the releasable information is only partially useful and informative." I will be suing the Office of Legal Policy in U.S. District Court to overturn this denial.

It is worth noting that these denials of fee waivers are inconsistent with the actions of several other federal agencies. The Department of the Treasury, for instance, has waived all search and copy fees "in the public interest" for hundreds of files on Minneapolis gangster Rocky Lupino. In the blunt words of the Department of the Treasury: "You qualify for a fee waiver. A fee can be waived when it is in the public interest."

My experiences have convinced me that the Justice Department's decisions

on fee waiver appeals are being made in an arbitrary manner.

DELAYS IN PROCESSING FILES:

When I've offered to pay the Justice Department fees for its files, the Department has delayed processing of FOIA requests for months, even for years, beyond the deadlines established under the Freedom of Information Act.

For instance, in August 1981, I initiated an FOIA request for all FBI files pertaining to the late organized crime "Godfather of Minnesota," Isadore Blumenfeld. Eleven months passed, until on July 1982, I received a telephone call from the FBI claiming that processing of the files was nearly complete.

In November 1982, the FBI apologized for its delays and promised that processing of Blumenfeld's files was nearing completion with "release of the material to you...anticipated in the near future." Again, months passed. In April 1983, I wrote to the FBI asking for an estimated completion date for this processing.

Finally, in October and December 1984 - almost three full years after I'd filed the initial FOIA request - the FBI released more than 1,400 heavily-censored pages of files on Blumenfeld.

Similarly, it took the FBI 18 months to process 83 pages of files on slain Minneapolis journalist Arthur Kasherman - a year and a half between the day I notified the FBI of my willingness to pay fees for Kasherman's files and the day they actually mailed this handful of documents.

It's been my experience that processing of files by the FBI is very slow even when the number of pages to be processed is relatively small. For example, I agreed in July 1986 to pay fees so that the FBI would process 63 pages of files on the Irish syndicate figure Tommy Banks. Almost two years later, in May 1988, the FBI released the files on Banks to me - rendered virtually unreadable by wholesale deletions. The Bureau had taken 682 days to process 63 pages of FBI files - an average of more than 10 days of delay for every single page released.

The FBI is not the only Justice Department agency which responds slowly in processing FOIA files. In July 1982, I filed an FOIA request for Criminal

Division files on gangster Isadore Blumenfeld. By February 1983, the Criminal Division had identified 14 files under Blumenfeld's name but said that "a heavy work load would delay processing" of my request. The Division promised that the Blumenfeld files would be processed "as rapidly as possible."

More than two years of delay followed until in January 1985, the Criminal Division finally released its pages on Blumenfeld.

These delays of two to four years in processing files under the Freedom of Information Act handcuff journalists who need to use the FOIA for newspaper stories that cannot wait 48 months for completion. As a result of these delays, publication of my book has been delayed by several years - and the public has been prevented from reading about a subject of great interest to them.

I believe that such processing delays by the Justice Department are not necessary. For example, on April 14, 1986, I requested a fee waiver and release of 300 pages of Bureau of Alcohol, Tobacco and Firearms files on bankrobber Salvatore Lupino. Just one week later, on April 23, 1986, the Treasury Department released the files on Lupino at no charge and with virtually no deletions.

ARBITRARY AND CAPRICIOUS DELETIONS:

In February 1987, I received 1,651 pages of FBI files on the Bureau's "Top Hoodlum Program" of surveillance of major organized crime figures.

The FBI withheld 1,300 pages of Minneapolis Top Hoodlum Files in their entirety - historic files pertaining to long-dead gangsters. The majority of the 1,651 pages of Top Hoodlum files released to me were heavily-censored. Most often, only the file numbers and administrative markings remained - with 80 to 90 percent of the material on gangsters deleted.

Much of the deleted Top Hoodlum material appears to discuss links between law enforcement officers or public officials and organized crime figures - a subject of overwhelming public interest. For instance, the FBI deleted every word of a 1962 memo in the Top Hoodlum files outlining "Political Tie-Ups With Organized Crime."

Similarly, in May 1988 the FBI released 50 pages of Bureau files on deceased bootlegger Leon Gleckman after delays totalling 22 months. Most of the Gleckman files were rendered unreadable due to wholesale deletions.

Again, the FBI invoked the FOIA's privacy exemption to withhold information in Gleckman's file linking corrupt law enforcement officials with gangsters. For example, when processing the Gleckman files, the FBI deleted the names of police officers who acted on behalf of organized crime as "moles" within the St. Paul Police force. The Bureau also deleted the names of public officials tied to the Barker/Karpis gang, the names of politicians known "to be on the take" with the mob, the names of police who "tipped off" gangsters to impending raids, information on the purchase through bribery of "two City Councilmen" and the identity of a U.S. Attorney with close links to mob figures. The result, of course, is that the readers of my book will be denied access to this important information on the relationship between public officials and organized crime.

Finally, when the FBI released in 1984 about 62 pages of files on deceased Irish syndicate leader Edward Morgan, it rendered the file almost unreadable by wholesale deletions. Again, the deletions appeared to revolve around the activities of public officials with links to organized crime.

In my 1986 appeal of the FBI's Ed Morgan file deletions, I noted that the FBI had deleted from the files details of corrupt activities by Minneapolis police controlled by Morgan. In addition, the FBI had deleted most of a 1934 memo discussing contacts between gangsters and police departments, details of payoffs to police officers made by Morgan's syndicate, the names of 16 public officials who actually received payoffs from organized crime, the names of public officials who "furnished protection to Ed Morgan," and the details of corrupt deals between Morgan and the Minneapolis County Attorney.

The FBI claimed the "privacy" exemption to justify withholding information on public officials from the citizens whom they served. When the FBI reprocessed its files on Morgan, it was revealed that originally the FBI had deleted such confidential information as the names of the Mayors of Minneapolis and St. Paul.

In May 1987, the Office of Legal Policy denied my FOIA appeal of the FBI's

deletions of this material. I intend to sue the Justice Department in U.S. District Court to compel release of this material to the public.

Again, when the FBI processed files on Minneapolis journalist Arthur Kasherman, it deleted 90 percent of the material from a 1944 memo headlined "Political Tie-Ups With Organized Crime" and virtually every single word of the section headed "Police Tie-Ups with Organized Crime."

From my experience, it appears that the Justice Department has used FOIA exemptions to justify withholding evidence of corruption from the public. I appealed the FBI's deletions from Morgan's file in May 1988. My appeal mentioned the fact that the public's interest in understanding the ties between elected officials and gangsters vastly outweighed the deceased public official's alleged privacy interests in hiding his corruption from the public.

Minnesota's most notorious gangster was the late Isadore Blumenfeld, a man referred to as "The Godfather of Minnesota." Under the FOIA, the FBI released to me in 1984 some 1,477 pages of files on Blumenfeld - most rendered worthless for historic scholarship due to massive deletions. Another 640 pages of material was withheld in its entirety.

Given the tremendous public interest in Blumenfeld and the fact that virtually all of his criminal associates are long-dead, the extent of the Justice Department's withholding surprised me. Moreover, the FBI's deletions of Blumenfeld's files was inconsistent with the full disclosure of Blumenfeld's files by other federal agencies. For example, the Immigration and Naturalization Service quickly released 250 pages of investigative files on Blumenfeld - with almost no deletions whatever.

Similarly, the U.S. Department of Labor quickly released its file on Blumenfeld - again, with almost no deletions. And the U.S. Bureau of Prisons released its entire prison and medical file on Blumenfeld with barely a single deletion.

In contrast to that cooperation with reporters, the FBI deleted material from their file on Blumenfeld pertaining to corrupt behavior committed by federal law enforcement personnel - material that referred to "irregularities on the part of Internal Revenue Service personnel." In August 1987, the Office of Legal Policy denied my appeal of these deletions and upheld the FBI's withholding. I intend to sue the Justice

Department in U.S. District Court to overturn its denial of my appeal.

Finally, the Justice Department also inflicted significant deletions to the FBI files it processed for me on the late Arthur Stillman of Minneapolis - a public official who was allegedly a suspect in the most famous kidnapping in Midwest history, the Virginia Piper kidnapping case.

In September 1982, I initiated an FOIA request for FBI files on Stillman. Two months later, the FBI announced that it would withhold 128 pages of Stillman's files in their entirety - pages with material of tremendous historic importance and public interest. The 64 remaining pages from Stillman's file that were released were severely edited. (I appealed the FBI's deletions and, in July 1983, the Office of Legal Policy denied my appeal.)

Among the material deleted by the FBI was an allegation that Stillman may have been deeply involved in criminal activity. For example, the FBI appears to have deleted information that suggests that Stillman, a member of the Minnesota Parole Board, may have used his position as an official to violate the public trust by obtaining early release for selected murderers. The FBI also deleted material that suggests that Stillman may have actually received ransom money from the Piper Kidnapping which was "used by Stillman to purchase narcotics." Furthermore, the FBI deleted information that suggested that this former Minnesota Parole Board official may have intended to have an associate murdered before he could tell the police about Stillman's involvement in the Piper kidnapping.

This is precisely the kind of historic information on public figures that gives citizens a better understanding of how organized crime affects their local government. I believe that in resisting the release of these files to the public, the Justice Department is denying citizens the right to become informed about the history and workings of their government.

CONCLUSION:

After seven years as a requestor under the Freedom of Information Act, my experience has suggested that the Justice Department is not complying adequately with the law. Its compliance with fee waiver provisions has been slow and inconsistent. Its processing of files requested under the FOIA has been subject to delays of up to two or three years and has been subject to excessive deletions. Its responsiveness not only to my

requests, but to legislators requesting information on the status of my requests or appeals, has been spotty at best.

The Justice Department has used the Freedom of Information Act as a shield to hide public corruption rather than as the tool for public disclosure for which it was enacted.

The end result is that my readers - the ultimate beneficiaries of this book on organized crime - have been denied the opportunity to learn about this portion of their own history in a timely manner.

Thank you, Mr. Chairman, for this opportunity to testify. I will, of course, respond to questions.

Senator LEAHY. Thank you, Mr. Maccabee, and I will have questions.

Mr. Piller, if you will excuse me, I am going to leave to go for the vote. In fact, just about the time I walk out of this room, you will hear five buzzers go off, and that is the 5-minute notice. But I will be back; don't leave. Thank you.

[Recess.]

Senator LEAHY. Mr. Piller, I apologize for the delay. It looked like there was going to be another vote right afterwards and that is what kept me there. They didn't have it. I am back. Go ahead, sir.

STATEMENT OF CHARLES PILLER

Mr. PILLER. Thank you very much, Senator Leahy. My name is Charles Piller and I am an investigative journalist specializing in biological arms control, and the author of "Gene Wars," a book about the U.S. military's work in biological warfare and genetic engineering.

I really appreciate this opportunity to describe my experiences with the FOIA. With your permission, I would like to submit a statement for the record and make a brief presentation.

Senator LEAHY. Go ahead, sir.

Mr. PILLER. I have used the FOIA as a vital tool to obtain information about military programs that entail profound arms control and public health implications. My goal has been to expand informed public debate about the nature and wisdom of the Defense Department's ongoing efforts in biological warfare.

I will be focusing my comments on a January 1985 FOIA request to the Army seeking documents associated with field tests of biological warfare organisms during the fifties and sixties, and I regret that Senator Hatch had to leave because these tests were conducted in his own backyard.

The purpose of the request is to determine the range and extent of such testing and to appraise Army safety practices. Because extensive secrecy enshrouds this work, the public must rely on the Army's reassurances that its current biological weapons program is safe, properly conducted, and in the national interest.

A prime factor in evaluating the credibility of such reassurances, of course, is whether prior Army research was conducted safely and whether the Army's public statements have accurately portrayed that research program. Hence, my request.

More than 3 years have passed and the request is far from resolved. Initially, Army authorities said that my search and duplication fees for the request would be $2,500, and denied my request for a fee waiver.

I was then joined in the request by the CBS news program "60 Minutes," and we agreed to pay the $2,500. Three weeks later, the Army claimed that the first estimate was a slight miscalculation. We were informed that fees would now run as high as $500,000.

To say the least, it seemed highly suspicious that as soon as CBS joined the request and we agreed to pay the fees, the fee estimates were revised upward astronomically. Nevertheless, we made a good-faith effort, directly following Army suggestions, to narrow the scope of the request and make it more manageable.

Army officials suggested that we week an index of the reports in question. We could use the index, they said, to request the most relevant documents. The Army then sent us on a wild goose chase, referring us to government data banks that either did not store or would not release the pertinent information.

Then the Army acknowledged that even an index listing unclassified studies might be classified due to the mosaic concept, with which I am sure you are familiar. The idea holds that a broad range of unclassified materials could be used to create a classified overview of a given subject.

I found it Kafkaesque that the mosaic concept was now being applied to a mere index—an index the Army itself suggested, indeed urged us to review. We began to doubt the Army's seriousness in complying with the FOIA.

Months later, an Army official disavowed the higher fee estimate, reverting back to the original $2,500 figure. Soon after, they released 31 documents, along with a bill for $8,600.

We refiled the fee waiver request, using largely the same arguments as the first go-around. To our surprise, but in keeping with the Army's unpredictable approach, the request was approved.

Since then, documents have slowed trickled forth, accompanied by repeated Army assertions that they have released all the relevant materials. Yet, information the Army itself provided proves that their releases have been only the tip of the iceberg. We are now waiting for our most recent appeal to be processed.

I have also been troubled by the manner in which classified documents were censored. Deletions of up to 100 pages were made with no apparent effort to excise only properly classified portions, and suggest a high degree of arbitrariness in their deletions.

I might add that my original concerns about the Army's credibility on biological warfare testing proved to be well founded. Based on the relatively few documents we have seen so far, I have identified blatant misrepresentations and gross omissions in a key Army report to a Senate subcommittee in 1977.

This episode was indeed bizarre, but hardly unique in my experience and that of other journalists. Without effective disincentives to agency foot-dragging and outright noncompliance, self-serving,

arbitrary censorship on the pretext of protecting national security will certainly continue.

If the American people are to participate intelligently in setting military goals in our democratic society, this kind of information must be made more accessible. The flaunting of the FOIA represents the true threat to national security.

Thank you very much.

[The prepared statement of Mr. Piller follows:]

Testimony of Charles Piller

Senator Leahy and subcommittee members: My name is Charles Piller, and I am an investigative journalist specializing in biological and chemical arms control. (A brief biographical statement follows this testimony.) I greatly appreciate this opportunity to describe my experiences in seeking information under the Freedom of Information Act (FOIA).

I have used the FOIA to obtain information about what are highly secretive government programs pertaining to biological and chemical weapons research. The policies and tests I have sought information on entail profoundly important national security, arms control and public health implications. My purpose in seeking these documents has been to expand informed public debate about the nature and wisdom of the Defense Department's ongoing efforts in biological and chemical warfare (CBW). My work has taken the form of numerous newspaper and magazine articles, as well as a book, *Gene Wars: Military Control Over the New Genetic Technologies*, published early this year by William Morrow and Company. While I have found the FOIA invaluable in my work, extreme difficulties with agency noncompliance have, at times, made my work impossible.

I will be focusing my comments primarily on an FOIA request to the Department of the Army, which I filed in January 1985. The request is for

documents associated with field testing of pathogenic biological organisms during the 1950s and 1960s at Dugway Proving Ground (a test site in Utah). The purpose of the request is to determine the range and extent of such testing and to appraise the safety practices used during those tests.

My interest is not just for the sake of the historical record. The current Army biological weapons (BW) research program, which by conservative estimates runs nearly $100 million per year, is portrayed by the Army as safely conducted, well administered, and properly defensive in character. Indeed, the United States is a signatory to the 1972 BW and Toxin Weapons Convention, which prohibits the use and possession of such weapons. Even the military acknowledges, however, that in BW research the difference between offense and defense is a matter of application and intent. Many leading scientists (and recently, Senate investigators) who have evaluated Army descriptions of its work are concerned that the program generates grave public health hazards. Others suggest that the research is highly destabilizing to the biological arms control process. Yet, because of the Army's extensive secrecy about this work, the public must rely on the Army's reassurances that its program, as constituted, is in the national interest. We are asked to accept the Army's "trust us" position, with no oversight of the program's goals and methods.

A prime factor in determining the Army's trustworthiness on BW matters, of course, is whether that agency has conducted its biological research safely in the past, and whether its public statements have accurately portrayed its past

research program--hence the request. I was stimulated to pursue this issue, in part, by the experience of previous requesters using the FOIA. In the 1970s, they uncovered numerous revelations of CBW testing by the Army and the CIA that was of dubious merit and was conducted with callous disregard for public health; indeed, using unwitting human guinea pigs.

(By the same token, I also used the FOIA to obtain data on the Army's current BW research, to determine if those studies are consistent with the program's stated goals and characteristics. My experiences in this regard are presented below.)

I have filed about two dozen FOIA requests to several federal agencies, including the DOD, CIA, Department of Health and Human Services and Department of Education, over the past few years. The Dugway Proving Ground request, by a wide margin, has proved the most problematic. Three and one-half years after the request was filed, it is still far from resolved. Federal agencies rarely comply with the letter of the FOIA rules on deadlines. To be sure, moderate delays for complex or lengthy requests are understandable. But it strains credulity that any request would require routine delays of several months at each step of the process. The voluminous correspondence and legal preparations have consumed hundreds of hours of work on the part of my attorneys and myself. I would not have been able to continue without attorneys who work for a nomial fee because they believe in the importance of this work. Many journalists who do not have such legal help

must abort legitimate inquiries in the face of resistance by the government. Following are the basic issues and frustrations I have encountered:

Wildly Conflicting Estimates of Fees

Dugway authorities initially estimated that the cost for search and reproduction of documents pertaining to my request would be approximately $2,500. This sum was well beyond my ability to pay. The Army denied my request for a fee waiver on the grounds that the historical information I was seeking would not contribute meaningfully to public understanding of this issue, nor is it relevant to the current BW research program. The Army claimed that all pertinent information had previously been published in a report to a Senate subcommittee in 1977.

Shortly after receiving this response, I was joined on the request by the CBS News program, 60 Minutes. We agreed to pay the $2,500 and asked Dugway to expedite the request. Three weeks later we received a response from the headquarters of the Army Test and Evaluation Command (TECOM--the Army agency above Dugway) indicating that the initial estimate was a miscalculation--by a factor of 100 or more. We were informed that the request would now cost a minimum of $206,297, and could run as high as $500,000. Instead of the relatively small number of documents we expected after the original estimate, we were told that more than 10,000 relevant documents containing approximately 1.5 million pages had been identified.

Apparently Deliberate Efforts to Obfuscate the Process

This staggering load of information would have been well beyond our ability to evaluate, and obviously was financially prohibitive and unduly burdensome on the government. To say the least, it seemed highly suspicious that as soon as CBS joined the request and we agreed to pay the fees, the fee and document estimates were revised upward astronomically. Nevertheless, we made a good-faith effort, directly following Army suggestions, to narrow the scope of the request to make it more specific and manageable. TECOM officials suggested that we seek indexes of the reports in question. We could use the indexes to request specific reports that pertain most directly to the request. TECOM referred us to two governmental data banks--the National Technical Information Service (NTIS) and the Defense Technical Information Center (DTIC), which were described as repositories for the information. After two months of conversations with these agencies, I discovered that contrary to TECOM suggestions, NTIS does not hold the information in question. DTIC maintains some of the information, but denies access to private citizens.

TECOM then consented to review the DTIC index, as well as a 32-*volume* Dugway index. I was told that these indexes, although containing unclassified studies, were themselves classified due to the "mosaic" concept. This highly controversial idea holds that a broad range of unclassified materials could together be used to create a classified overview of a given subject. It has increasingly been used to deny the release of unclassified documents under the

FOIA. I found it outrageous, however, that this mosaic concept had been taken a step further--to withhold merely an index of the documents.

Ten months later I was presented with an 18-*item* "index"-- representing a ludicrously small percentage of the total holdings. This was represented as a complete list of studies relevant to my request. It is particularly ironic that the Army would make such a claim given the fact that TECOM itself alerted me to a list, supplied to the Senate in 1977, which notes many more than 18 tests.

At this point we began to question the Army's seriousness in complying with the FOIA. These time-consuming reviews, followed by inconsistent, obviously inadequate and perhaps disingenuous responses, appeared to be a deliberate effort to wear us down and cause us to abandon the request in frustration.

Several months later, in response to a letter from my attorney, a Dugway official disavowed the TECOM fee estimates and actions, and reverted to the original estimate of $2,500. The discrepancy between the estimates for fees and numbers of documents has never been adequately explained. The Dugway official indicated that he would begin a new search for relevant documents, and begin to release the unclassified holdings. Six weeks later Dugway released 31 documents, along with a bill for $8,600. This action was contrary to our specific instructions that we be notified of high fees in advance. We then re-filed a fee-waiver request, using arguments that were largely the same as the original fee-waiver request two years earlier. We expected a perfunctory denial, which would have forced us to drop the request or move to litigation. This time, much

to our surprise, but in keeping with the Army's unpredictable approach, the request was approved.

Since that time documents have slowly trickled forth; to date 63 have been released. On several occasions during this period, the Army claimed to have released all the relevant documents. But each time, my attorneys responded that information already in the public record--indeed, information the Army itself provided--proved that their releases were merely the tip of the iceberg. Then, in each case, Army officials somehow managed to find new documents to release. We are currently waiting for our most recent appeal to be processed.

Other Roadblocks Used by the Army

Two other aspects of the Army's actions led us to suspect a deliberate effort to deter our investigation. The first involves the relevance of documents released so far. More than a dozen documents, involving a total of several thousand pages, contain no references whatever to the subject of the request, field testing of biological agents. These were, however, time consuming to examine, and certainly served the purpose of slowing me down by burying me in irrelevant materials.

I have also been troubled by the manner in which portions of classified documents were censored. Deletions of up to 100 pages were made in many documents, with no ostensible effort to excise only properly classified portions and leave releasable portions intact, as the FOIA requires. These deletions seem particularly arbitrary in light of other documents we have received. For

example, in several instances, sections pertaining to safety precautions and test results have been withheld in full or in part. Yet, similar information in other documents with respect to other tests, many of which involved the very same biological agents, were released in their entirety. The Army also ignored the FOIA requirement that it cite specific sections of the Act permitting the deletions. This made it difficult to establish credible justification for our appeal. Furthermore, the deletions themselves were cut out, rather than blacked-out, turning many of the documents to virtual confetti.

Results of These Efforts

Despite this strange and exasperating experience, through dogged determination we have pieced together many important pieces of the BW puzzle. Indeed, the major concerns that were the basis of this request--pertaining to the Army's openness about its safety record and about the extent of its field testing with dangerous biological agents--proved to be well founded. Contrary to claims made by the Army to the Senate in 1977 and repeatedly since then, documents we have obtained show cavalier, appallingly poor safety practices. In addition, despite repeated requests, we have never received any documents pertaining to the blue-ribbon safety committees set up to oversee the testing program. Furthermore, scores of tests that were never before revealed are indicated in the documents released to us, proving that the 1977 Army report was grossly incomplete. At best, this was incompetence in record keeping--at worst deliberate subterfuge. This, of course, leads us back to the larger purpose

of the request--to appraise Army credibility based on its track record. The results of my research are hardly reassuring in this regard. I continue to seek the other documents relevant to this request in order to explore that question more completely.

A Common Experience

Although this episode was particularly bizarre, it is by no means unique. I'm sure you're aware that the Army and other government agencies have used their control over the bureaucratic process to prevent journalists from using the FOIA as it was intended by Congress.

In my own experience, I have encountered these tactics repeatedly. For example, in another line of research for my book I sought the unclassified summaries that the DOD prepares for each of its biotechnology research studies. The object was, again, to evaluate the military's claims that its work was safely conducted and properly defensive in nature. The response I received was disconcertingly similar to my experience in the Dugway example.

After many months of unexplained delays, I received a number of records that were described by the DOD as the complete inventory of studies. I then reviewed other open, publicly available sources, including a wide range of DOD documents, scientific journal articles and press reports. I also filed new FOIA requests to other branches of the military bureaucracy to cross-check the original request. I discovered that the documents released constituted only a fraction of the relevant, unclassified documents. Moreover, I was able to

determine that the materials released to me did not even represent a good cross-section of the program. Again, one of two explanations is inescapable; either the DOD has lost administrative control over its biological weapons research, or it is deliberately obscuring the range or extent of the research program. Neither prospect is particularly reassuring.

I urge you to press legislation to strengthen the FOIA. At present, there are no effective disincentives to agency foot dragging, no meaningful penalties for outright noncompliance. Moreover, exemption categories allowed by the Act are so general as to encourage wholesale, self-serving or arbitrary censorship on the pretext of protecting "national security."

In sum, despite the many difficulties associated with this process, I have found the FOIA essential in unearthing unclassified information with significant implications for military policy. I must conclude, however, that the Army's actions were illegal, and calculated to withhold information key to public policy debates. If the American people are to participate intelligently in setting military goals in our democratic society, such information must be made more readily available. Agency noncompliance with the FOIA is the true threat to national security.

Biographical information on Charles Piller

Charles Piller is an investigative journalist specializing in science and technology issues, and is one of the nation's leading reporters on biological and chemical weapons. Piller is co-author of *Gene Wars: Military Control Over the New Genetic Technologies* (published by William Morrow and Company, 1988), an exposition of the history of biochemical warfare and an analysis of current U.S. Department of Defense research into biological weaponry using the tools of genetic engineering. His articles on this subject have appeared in *The Philadelphia Inquirer, The Nation, The Oakland Tribune* and many other publications. His work has become of the basis for articles by journalists and academicians around the country. Piller has assisted the Senate Subcommittee on Oversight of Government Management in its recent investigation of the DOD's biological weapons research. He has served as a consultant on biological and chemical warfare issues to CBS News and several local television stations, and has been interviewed about this subject by dozens of local and national publications and broadcast media.

More generally, Piller's writings on health, government regulation and international affairs have appeared in *The Los Angeles Times, Baltimore Sun, Toronto Globe and Mail, San Francisco Chronicle, San Jose Mercury News* and many other publications. Piller is employed as a writer by the University of California and lives in Oakland, California.

Senator LEAHY. Mr. Peek, the 1986 amendments to the Freedom of Information Act that I helped write said that "representatives of the news media" would be entitled to the most liberal fee treatment. Now, your testimony states that you were treated somewhat differently.

Am I correct that the CIA had some problems with your credentials as a journalist? Was that one of the things they were saying to you?

Mr. PEEK. Evidently so. They defined a journalist as someone that reported about current events and then went on to decide what current events are.

Senator LEAHY. So what they did was take an editor's position rather than a legal one? I don't mean to put words in your mouth, but did it appear to be that for you?

Mr. PEEK. Right. I guess they don't determine that editors are necessarily journalists at all times. Sometimes I don't feel like one, but I believe that I am.

Senator LEAHY. Well, the thing that occurs to me is that it is sort of like somebody looking at the article in the Washington Post of a couple of days ago where Dean Rusk was talking about how there had not been adequate information given to the President regarding the Bay of Pigs as a result of him going into Cuba.

It almost seems like if somebody were going to write about the Iran-Contra situation and went back to see if there were parallels of whether Presidents are notified or not, then they could be told, well, it is not a current event. Is that similar?

Mr. PEEK. That is correct. Their definition seems to be capricious, at best.

Senator LEAHY. Now, there was no suggestion, was there, on their part that what you were asking for went into classified material, went into material the disclosure of which would affect national security?

Mr. PEEK. One of the three areas I requested documents for, they did indicate would be classified. The other two, however, they indicated would not be classified and they would be happy to search for them.

Senator LEAHY. Not at the liberal fee treatment that representatives of the news media are supposed to get, however?

Mr. PEEK. That is correct. They treated me as a commercial requestor.

Senator LEAHY. And that was because of an editorial judgment made that what you were writing about was not of current interest?

Mr. PEEK. Exactly. It is unfathomable. It was a major issue on the campus, in the town, written about statewide, and if that is not a current event of current interest, I don't know what is.

Senator LEAHY. If I can just indulge in a little bit of hometown knowledge, I heard discussion of similar matters within the past few weeks when I was in Middlebury. So, I mean it is at least that current.

Mr. Maccabee, we discussed at least in an abstract fashion with Mr. Markman your request. Why did you get so much interest in this? I mean, you have talked to just about everybody who supported you on it. You talked about looking into corruption by organized

crime with the police agencies, city government, and everybody else.

You have the chief of police, the mayor, the local representatives, as well as the Federal representatives all supporting your request. How do you account for that?

Mr. MACCABEE. Good question, Senator. George Santayana, the philosopher, once said those who do not remember history—and in this case the history of organized crime—are condemned to repeat it.

What I have received from law enforcement groups, everybody from the Chicago Crime Commission in Illinois to the attorney general of Minnesota, has been the connection that unless we understand the corruption, the compromising of the public trust, and the inroads that organized crime has made in the past in Minnesota and all over the country, we can never really understand what is going on today.

Senator LEAHY. Now, you have heard the Department of Justice say you are a large FOIA requestor, and that is part of the reason for the delay, just the volume of your requests. Naturally, we would be concerned if 240 million Americans made the same kind of request you did. Of course, it would all grind to a halt.

Should we have some sympathy for the fact that you are a large requestor? How do you respond to that?

Mr. MACCABEE. I am pleased that you brought that up. I believe the statement by Mr. Markman was made that I have filed something like 350 FOIA requests. It is a little bit deceptive in that after the vast bulk of those requests, I received a form letter back which said as follows: "There are no documents relevant to your request."

So, in fact, administration of those requests perhaps took a few minutes or, at most, a few hours. They didn't find anything in many of those. In fact, many of the requests I have made deal with only a handful of documents. One of the most important—there are six pages of documents—and it has taken them months, if not years, to process those.

There are roughly 10,000 or so documents that we are fighting over. Frankly, I see that as quite manageable. That is over a period of seven years, 10,000 documents. Other agencies, such as the Immigration and Naturalization Service, dealt with 1,000 pages of organized crime files from Minnesota in a matter of two or three weeks.

Senator LEAHY. That was based on a request you had made?

Mr. MACCABEE. That is correct. There is an example here of, again, the rather egregious deletions that are made. What is fascinating about this page, which looks like a child with a black Magic Marker ran rampant over these files, is, No. 1, it is more than 25 years old and, No. 2, the title of this file is "Politics and Crime" and there is an introductory paragraph before the material is deleted that says: "This material discusses politicians and organized crime."

So in this case—and the deletions were made for privacy reasons—it appears to me that the Department of Justice is saying the public has no right to know that mayors, city council people, or other public officials in the public trust have had bribes, payoffs,

relationships with mobsters. That, to me, seems rather a surprising understanding of the FOIA.

Senator LEAHY. It reminds me a little bit of a time when we had a hearing in another committee I was on. They put up a photograph that was marked, you know, top secret, classified, sensitive, and just about everything else; burn before reading, and that kind of thing.

And I did ask the person from the particular agency who was putting it up, if that was not the same photograph that I had seen in, I forget if it was either Time or Newsweek, 2 weeks before, and he said that it was an amazing coincidence, but, yes, it was.

And I said, what did they do to get those 8 million copies or whatever it is, the weekly run of Time or Newsweek, off the stands. They did suggest that there was a bit of, at least on the face of it, a contradiction in that circumstance.

But I have looked at a number of these things that you are holding up both before and after they were blacked out. I can think of an instance of one involving an organized crime situation which was blacked out and which I thought was legitimate. It involved an ongoing investigation.

For most of them, I wondered who in heaven's name came up with the idea to blackout out the things which were about as innocuous as the photograph that appeared in Time or Newsweek a few weeks earlier than the intelligence briefing.

Mr. MACCABEE. Senator, I had the opportunity yesterday to go the National Archives and do some research there on the same subject, organized crime in Minnesota. What was startling and, as a researcher, rather exhilarating is that they have files there from the Bureau of Investigation going back to the 1930s that are, in fact, precise duplicates of files that I have received from the FBI.

However, there is a little bit of a difference. The material that I received from the FBI censored like this. The material that is in the National Archives had virtually no deletions whatsoever.

So one would be able to make a comparison between the Department of Justice releasing and any archives. In fact, the material that is in it, once you see it without the deletions, frankly is obviously eminently releasable. It deals with public officials, people who are long dead, clearly in the public interest.

Senator LEAHY. Thank you.

Mr. Piller, I was interested in your request and the fact that you got one price of about, what was it, $8,500, or something like that, in your original request, and then when you mentioned that "60 Minutes" was interested, the cost went up to $500,000.

Did you feel pretty impressed by that? I mean, did it give you a sense of importance?

Mr. PILLER. I guess that suggests that "60 Minutes" may have slightly more prestige than I do as an individual.

Senator LEAHY. You didn't, however, feel an urge to go and kick in half a million bucks of your own money at that point, did you?

Mr. PILLER. Well, I checked my bank account and I didn't have quite enough to cover it. In fairness, I should say that they said a deposit of 100,000 would probably allow them to begin the search process.

Senator LEAHY. But you didn't send the $100,000 either?

Mr. PILLER. No, I didn't.

Senator LEAHY. OK. To be serious, though, is there any question in your mind that that price tag got slapped on there because of "60 Minutes' " interest and not because of your original request?

Mr. PILLER. Well, I think it would be inescapable that that conclusion is accurate.

Senator LEAHY. Now, the Army did notify you that your request was too broad and offered to help you narrow the request, is that correct?

Mr. PILLER. Indeed, they did, sir.

Senator LEAHY. And did they actually do that?

Mr. PILLER. No. They provided no effective assistance narrowing the request, even though we did comply with all of their suggestions, I think, in a very careful manner. The most problematic of their suggestions was that they kept changing their story.

They suggested—indeed, they urged us very forcefully—to narrow the request by looking at an index of the studies and then just choosing the ones that were truly relevant to our most closely specified concerns.

We proceeded to try to get that index from them and received nothing but contradictions as we went on that path. Finally, they ultimately refused to release anything close to an index. They actually started with describing a 32-volume index of the studies we were seeking, and finally released to us an index of 18 items out of 32 volumes.

Senator LEAHY. Do you feel that fee assessments that are obviously incorrect can be a pretty effective way of closing out somebody who wishes to make FOIA requests?

Mr. PILLER. Well, I am afraid to say, Senator Leahy, that it is a very effective way. In fact, at the very least it slowed down my work by several years in trying to negotiate with the Army about a more reasonable approach.

I might add that I had the benefit of having pro bono attorney time to complete the rather voluminous legal arguments that were required for the fee waiver request and correspondence with the Army.

I know of many cases, including my own, but also with other journalists, where their work was basically shut down by an inability to obtain free legal assistance. As I understand it, the act was written to allow individuals the ability to actually do their own work in making these requests and I have found that to be virtually impossible in this instance.

Senator LEAHY. You are not in opposition to biotechnological research and development, am I correct?

Mr. PILLER. Absolutely not, sir. I believe it is very important for our country.

Senator LEAHY. Do you have any question that there would be a great deal of interest in whether a $100 million biological weapons program is well administered and safely conducted?

Mr. PILLER. I believe that there not only is concern about that, sir, but, in fact, another Senate subcommittee was recently holding hearings on one aspect of that question. The particular concern that I am trying to address is this: When the Army says, "trust us, we are doing everything properly and this is in the national inter-

est," we have, as citizens, very little recourse except to examine carefully what we are trusting them about. This means seeing if their public statements reflect the details of their program and, second, whether their historic record also reflects that kind of honesty. This is really the crux of my interest in this subject.

Senator LEAHY. And it is those tests in the fifties and sixties that establish that historic record?

Mr. PILLER. Exactly.

Senator LEAHY. And the question of whether they are being safely tested or not, that issue would appeal as much to those who are in favor of the weapons as to those who are opposed to the weapons. I mean, that really does not go to the question of whether you are in favor or opposed to biotechnological weapons.

Mr. PILLER. Exactly, sir. In fact, the reason I was sorry Senator Hatch left is that he has gone on record opposing the placement of a new biological weapons research lab in his home State.

Senator LEAHY. Dugway?

Mr. PILLER. Dugway Proving Ground, and I think this is an example of the confusion and how it cuts across all different political perspectives. It is vital to critically evaluate the necessity for these programs as described by the military.

Senator LEAHY. Thank you very much. Gentlemen, I thank all of you. Again, we will keep the record open and if you think of points that you had intended to make and didn't make because either I didn't ask the questions or didn't ask them adequately enough, feel free to add to the record and note that that is added subsequently.

Thank you.

Mr. PILLER. Thank you very much.

Mr. MACCABEE. Thank you.

STATEMENT OF A PANEL CONSISTING OF JOHN H. WRIGHT, INFORMATION AND PRIVACY COORDINATOR, CENTRAL INTELLIGENCE AGENCY; RUSSELL M. ROBERTS, DIRECTOR, FREEDOM OF INFORMATION/PRIVACY ACTS DIVISION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND RICHARD C. FAULK, DEPUTY ASSISTANT SECRETARY FOR OPERATIONS, DEPARTMENT OF STATE

Senator LEAHY. Mr. Jack Wright from the Central Intelligence Agency; Richard Faulk, Assistant Secretary for Administration, Department of State; and Russell Roberts, the Director of the Freedom of Information and Privacy Division, Department of Health and Human Services.

Mr. Wright, Mr. Faulk, Mr. Roberts, it is good to have you all here. Mr. Faulk, it is good to see you again. I should add that somebody asked me whether we had had an earlier hearing and, in the interests of appropriate reflections of freedom of information, when I had mentioned chatting with Mr. Faulk before, this was over the weekend in a chance encounter.

Mr. Faulk is a dedicated and hard-working public servant and we have known each other for years. I have had the benefit of his expertise as a member of the State Department going back to an early trip to China, going back to the time of normalization. So, I just wanted to hasten to add that we did not rehearse testimony

before we started. It was more a discussion of the weather than anything else.

Mr. Wright, all of the statements will be put in the record and we will go back to that, but I wonder if I might ask you—just in case we have another vote—you heard Mr. Peek, who is the Editor for the Addison Independent, tell us he was treated as commercial requestor by the CIA. That sort of puts him in the same category as Exxon or Citibank.

Was that the right decision?

STATEMENT OF JOHN H, WRIGHT

Mr. WRIGHT. It is not really clear at this point. I think that, well, first of all, in many of the FOIA requests we get, many requestors allege that they have journalist connections and we do require a fairly high degree of specificity before we can make that determination.

And in the case of Mr. Peek, we do offer administrative appeal rights in the event that the initial determination either denies the fee waiver or the requestor is not satisfied with the initial category determination.

At the time that request was serviced, we had relatively little experience with the new provisions of the Reform Act, and my advice to Mr. Peek at this point would be, if he did not exercise his administrative appeal rights, to do so because in the process of doing that, we do expand the record. There is an exchange of information, and so forth.

The request for other fee considerations is looked at more broadly in our organization, and that really is the proper course of action at this point.

Senator LEAHY. Well, let me tell you the statute is fairly clear. It says:

> Fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by a representative of the news media.

Now, this newspaper has countywide circulation in a county where there is a well-known college, and one with which your agency has had a long and open relationship, I might add, as has the Foreign Service and others because of the language programs. Members of the Agency give lectures and open-to-the-public forums at Middlebury. Mr. Peek is an editor for that newspaper.

I mean, just based on what he has said here today, is there any reason why he has to go through an appeal process? I mean, isn't it pretty much on the face of it that he qualifies as a representative of the news media, or are editors precluded?

Mr. WRIGHT. Well, I believe he identified himself in the letterhead as editor of the Addison Press, and it may not have been entirely clear to our professional officers who processed the case that he was indeed the editor of a newspaper.

He did say in his request letter, and I have just had the opportunity to look at it today, that newspaper articles would be written based on the information disclosed. And the only thing I can say at this point is that the initial reaction to that request may have been

to not see a connection between him as editor as Addison Press and editor of the newspaper. [Laughter.]

Based on what has been said today, my guess is that were he to supply us additional information, he might well qualify for a fee waiver, or at least placement in the news media category.

The issue of whether he would be entitled to a fee waiver is—that would be considered on other merits.

Senator LEAHY. Well, I don't think he is going to have any difficulty proving the fact that he is a member of the news media, and if you would like an affidavit from me, I will be happy to do that. I have been both praised and damned by his newspaper, usually with evenhanded heavyhandedness. So it is not for any other reason that I say that.

But, you know, the thing that bothers me more than anything else is your letter, or your agency's letter, that was written by Mr. Strickland. It says this:

> Although you are an editor of the Addison Press, Inc., the information you seek does not meet the regulatory requirement of current events or information that would be of current interest to the general public.

Now, that is kind of an outrageous statement, not to put too fine a point on it, isn't it?

Mr. WRIGHT. Well, I think you have to look at the information requested, and essentially, as I recall, there were three items in that request. One of those items clearly involved a request for information on the possible conduct of intelligence activities involving representatives from the college.

Another of the items asked for information dealing with relationships with individuals associated with Middlebury College, and what we indicated there was that any records which might reflect the existence of a covert relationship, we would neither confirm nor deny the existence of any such records.

Senator LEAHY. But that is not the point. It says, "would not be of current interest to the general public." Now, any ongoing intelligence activity may be of current interest, and none of us disagree that you have an exemption for that. You neither confirm nor deny, and so on.

Mr. WRIGHT. Yes.

Senator LEAHY. I have no problem with that; I strongly support that. But on his specific request, to say that it "Would not be of current interest to the general public"—I mean, isn't this exercising an editorial function that goes way beyond anything that is set out in the law?

Mr. WRIGHT. Well, yes, I agree with that, but I would like to, if I could, come back to the nature of the request. In essence, the way that request was treated—and, again, forgive me; I do not have the correspondence in front of me and I am trying to recall this from memory.

Senator LEAHY. Sure.

Mr. WRIGHT. Essentially, a significant portion of that request was denied, and we cited exemptions, named a denying official, and gave Mr. Peek appeal rights. We focus, however, down to what was left, and the remaining portion of the request focused primarily, as

I recall—again, I do not have the letter in front of me—on CIA recruiting activities at Middlebury College.

The CIA does recruit at colleges and universities throughout the Nation; it is a matter of public record. That fact has been made known many times with regard to many colleges and universities.

And, again, I come back to the point as to whether the information on the fact that we are, again, recruiting on a college campus in the United States would be of public interest or, and I believe we may have stated in the response letter, contribute significantly to an understanding of the operations of the U.S. Government.

And I think depending on which of those two criteria you apply, you might very well come up with a different viewpoint as to whether a fee waiver should be granted.

Senator LEAHY. Mr. Wright, I might say in that regard, along with one of the administrators of the CIA I went to Middlebury in a public forum. We discussed why it was very appropriate for the CIA to be there. I did this at the request of the Director of the CIA, who was at that time hearing from a number of different schools not only in my State but in a lot of other States, about why the CIA shouldn't be there recruiting.

I felt they had the absolute right to be there recruiting, as well as any company would or anything else. But if one agrees or disagrees with it, that is a choice for the student to make.

Middlebury had invited somebody who was strongly opposed to the CIA who spoke one night, or a couple of people did, and then one of the assistant directors of the CIA and I spoke of why they should be allowed to be there. Again, they were public forums.

The only reason I mention this is that it was an overflow crowd each time. Trust me, there was a great deal of public interest, and I suspect there would be today.

[The prepared statement of Mr. Wright and followup questions and answers follow:]

STATEMENT OF

JOHN H. WRIGHT

OF THE

CENTRAL INTELLIGENCE AGENCY

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

2 AUGUST 1988

MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW. I AM PLEASED TO APPEAR HERE TODAY TO OUTLINE FOR YOU SOME OF CIA'S RECENT EXPERIENCES AND ACHIEVEMENTS IN RESPONDING TO FOIA REQUESTS FROM THE PUBLIC AND TO DESCRIBE THE STEPS WE HAVE TAKEN IN CIA TO IMPLEMENT THE PROVISIONS OF THE FOIA REFORM ACT OF 1986. I SERVE AS INFORMATION AND PRIVACY COORDINATOR FOR CIA AND AM RESPONSIBLE FOR PROCESSING REQUESTS FOR INFORMATION SUBMITTED NOT ONLY UNDER THE FOIA BUT ALSO UNDER THE PRIVACY ACT AND THE MANDATORY DECLASSIFICATION REVIEW PROVISIONS OF EXECUTIVE ORDER 12356 AS WELL. I WOULD FIRST LIKE TO DESCRIBE SOME OF THE UNIQUE ASPECTS OF OUR PROGRAM, SOME OF THE SPECIAL PROBLEMS WE FACE IN CARRYING OUT OUR RESPONSIBILITIES UNDER THE ACTS, AND CONCLUDE BY DISCUSSING THE IMPACT OF RECENT LEGISLATION, INCLUDING THE REFORM ACT, ON THE OVERALL CONDUCT OF OUR PROGRAM.

THE CIA CURRENTLY EXPENDS APPROXIMATELY 100 MAN-YEARS ANNUALLY IN RESPONDING TO INFORMATION REQUESTS SUBMITTED BY THE PUBLIC. ABOUT HALF OF THE INFORMATION REQUESTS RECEIVED ARE SUBMITTED UNDER THE FOIA; THE REMAINING HALF OF THE REQUESTS RECEIVED ARE PRIVACY ACT AND MANDATORY DECLASSIFICATION REVIEW REQUESTS. WE FACE SPECIAL DIFFICULTIES IN RESPONDING TO INFORMATION REQUESTS BECAUSE OF THE NATURE AND MISSION OF OUR ORGANIZATION. THE FIRST DIFFICULTY IS THAT THE RECORDS SYSTEMS WHICH WE MUST SEARCH IN RESPONSE TO INFORMATION REQUESTS ARE DECENTRALIZED AND HIGHLY DISSIMILAR IN TERMS OF HOW THEY CAN BE

SEARCHED AND THE PURPOSE FOR WHICH THEY WERE INITIALLY ESTABLISHED. FURTHER, THE RECORDS SYSTEMS OF THE CIA ARE DELIBERATELY COMPARTMENTED FOR REASONS OF NATIONAL SECURITY, WITH ACCESS CONTROLLED ON A STRICTLY NEED-TO-KNOW BASIS. WHEN RECORDS POTENTIALLY RESPONSIVE TO INFORMATION REQUESTS FROM THE PUBLIC ARE LOCATED IN THE RECORDS SYSTEMS, THEY MUST BE PAINSTAKINGLY REVIEWED BY SENIOR INTELLIGENCE OFFICERS ON A LINE-BY-LINE BASIS BECAUSE OF THE HIGHLY SENSITIVE NATURE OF THE INFORMATION THEY CONTAIN. IN MANY INSTANCES, ADDITIONAL REVIEWS MUST BE CONDUCTED BY OTHER CIA COMPONENTS IN ORDER TO INSURE THAT ALL INFORMATION REQUIRING CONTINUED PROTECTION IS IDENTIFIED. THE POINT I WISH TO MAKE IS THAT THE RECORDS REVIEW PROCESS IN CIA IS LABORIOUS, TIME CONSUMING, AND EXPENSIVE. THE OVERRIDING CONSIDERATIONS IN THE REVIEW OF RECORDS TO DETERMINE WHETHER OR NOT THEY ARE RELEASABLE ARE THE STATUTORY REQUIREMENT LEVIED ON THE DIRECTOR OF CENTRAL INTELLIGENCE TO PROTECT INTELLIGENCE SOURCES AND METHODS FROM UNAUTHORIZED DISCLOSURE AND HIS MANDATE UNDER THE EXECUTIVE ORDER TO PROTECT CLASSIFIED INFORMATION. THESE MANDATES ARE TAKEN VERY SERIOUSLY.

DESPITE THE INHERENT DIFFICULTY CIA FACES IN RESPONDING TO INFORMATION REQUESTS FROM THE PUBLIC, WE HAVE MADE GREAT STRIDES IN PROCESSING REQUESTS. OUR BACKLOG OF OPEN CASES FOR YEARS WAS MEASURED IN TERMS OF THOUSANDS OF OPEN CASES. THE BACKLOG STOOD AT 3,146 OPEN CASES AT THE END OF 1983, BUT HAD

BEEN REDUCED TO 1,454 OPEN CASES BY THE END OF 1987 -- A REDUCTION OF WELL OVER 50 PERCENT. THE BACKLOG TODAY IS EVEN LOWER AND STANDS AT 1390 OPEN CASES.

EQUALLY DRAMATIC HAS BEEN OUR REDUCTION IN RESPONSE TIME TO PROCESS CASES, WHICH AVERAGED ABOUT 15 MONTHS IN 1985, BUT ONLY ABOUT ONE AND ONE-HALF MONTHS IN 1987. THESE IMPROVEMENTS IN PROCESSING PERFORMANCE WERE ACHIEVED DESPITE A 35% INCREASE IN THE VOLUME OF INCOMING REQUESTS OVER THE 1983-1987 TIME FRAME.

THE PRINCIPAL FACTOR RESPONSIBLE FOR OUR IMPROVED PROCESSING PERFORMANCE WAS THE ENACTMENT OF THE CIA INFORMATION ACT OF 1984, WHICH REMOVED FROM THE SEARCH, REVIEW AND DISCLOSURE REQUIREMENTS OF THE FOIA CERTAIN SENSITIVE CIA OPERATIONAL FILES. WE HAD PREVIOUSLY EXPENDED SIGNIFICANT RESOURCES IN SEARCHING FOR AND REVIEWING RECORDS CONTAINED IN THESE FILES ONLY TO FIND THAT THE LAW EXEMPTED MOST OF THE INFORMATION FROM DISCLOSURE ANYWAY. THE CIA INFORMATION ACT HAS CLEARLY ACHIEVED ITS PURPOSE OF ELIMINATING THIS UNPRODUCTIVE EXPENDITURE OF RESOURCES, THUS ENABLING THE CIA TO PROCESS REQUESTS FASTER AND MORE EFFICIENTLY WITH ESSENTIALLY NO REDUCTION IN THE AMOUNT OF INFORMATION ULTIMATELY DISCLOSED TO THE PUBLIC. IN A LETTER TO FORMER DIRECTOR CASEY, DATED 22 OCTOBER 1986, CONGRESSMAN ENGLISH, CHAIRMAN OF THE SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE AND AGRICULTURE STATED: "I CONGRATULATE YOU AND THE MEMBERS OF OF THE CENTRAL INTELLIGENCE

AGENCY'S FREEDOM OF INFORMATION ACT STAFF FOR THE PROGRESS REFLECTED IN THE FOURTH AND FINAL REPORT FILED UNDER THE REQUIREMENTS OF THE CIA INFORMATION ACT OF 1984. THE REDUCTIONS THAT HAVE BEEN ACHIEVED IN BOTH THE BACKLOG OF FOIA REQUESTS AND IN THE AVERAGE RESPONSE TIME ARE SIZEABLE." CONGRESSMAN ENGLISH CONCLUDES BY STATING: "THE IMPROVEMENTS MADE TO DATE FULFILL THE PROMISES MADE AT THE TIME THE ORIGINAL LEGISLATION WAS PASSED."

WE UNDERSTAND THAT YOUR PRIMARY INTEREST HERE TODAY IS TO FOCUS ON IMPLEMENTATION OF THE PROVISIONS OF THE FOIA REFORM ACT OF 1986, ESPECIALLY THOSE PORTIONS OF THE ACT DEALING WITH THE DETERMINATIONS OF REQUESTERS' FEE STATUS. ALTHOUGH WE HAVE ATTEMPTED TO BE AS COMPREHENSIVE AS POSSIBLE IN RESPONDING TO THE ITEMS CONTAINED IN YOUR LETTER OF 30 JUNE 1988 -- WHICH WAS RECEIVED IN MY OFFICE ON 19 JULY -- OUR FOIA LOGGING AND TRACKING SYSTEM IS NOT STRUCTURED TO ENABLE US TO ANSWER CERTAIN OF THE QUESTIONS YOU HAVE POSED. FURTHER, WE HAVE NOT HAD SUFFICIENT EXPERIENCE WITH THE REFORM ACT TO PROVIDE DEFINITIVE ANSWERS TO OTHERS. NEVERTHELESS, THERE ARE SEVERAL GENERAL OBSERVATIONS THAT WE CAN MAKE CONCERNING THE IMPACT OF THE FEE PROVISIONS AND I AM CONFIDENT THAT THESE OBSERVATIONS WILL BE BORNE OUT AS OUR DATA BASE GROWS.

THE FIRST GENERAL OBSERVATION I WISH TO MAKE IS THAT THE PERCENTAGE OF FOIA REQUESTERS OF CIA RECORDS WHO ARE ASSESSED

FEES WILL PROBABLY DECREASE AS A RESULT OF THE PASSAGE OF THE ORM ACT. MOST OF THE REQUESTS RECEIVED ARE SUFFICIENTLY WELL DEFINED AND SPECIFICALLY FOCUSED SO AS TO BE SERVICEABLE WITHIN THE 100 FREE PAGES OF RELEASABLE MATERIAL AND TWO HOURS OF FREE SEARCH TIME. FURTHER, WE BELIEVE THAT THE AMOUNT OF FEES ASSESSED THOSE REQUESTERS WHO DO NOT FALL WITHIN THESE PARAMENTERS WILL BE LESS THAN THE AVERAGE AMOUNT PREVIOUSLY COLLECTED PER REQUESTER. THESE OBSERVATIONS ARE BASED ON MY EXPERIENCE AS COORDINATOR IN PERSONALLY REVIEWING THE CASE FILES PRIOR TO SIGNING THE FINAL RESPONSE LETTERS TO THE REQUESTERS.

IN SUM, WE BELIEVE THAT THE PROVISIONS OF THE FOIA REFORM ACT STRIKE A REASONABLE BALANCE BETWEEN THE INTERESTS OF THE PUBLIC IN ACCESS TO GOVERNMENT RECORDS AND THE RESPONSIBILITY OF THE GOVERNMENT TO RECOVER USER COSTS. IN PARTICULAR, WE BELIEVE THAT THE FEE PROVISIONS FOR COMMERCIAL REQUESTERS PROPERLY PERMIT THE OPPORTUNITY TO COLLECT ACTUAL PROCESSING COSTS FROM THOSE REQUESTERS WHO SERVE TO BENEFIT COMMERCIALLY FROM DISCLOSURES MADE TO THEM UNDER THE FOIA BY THE GOVERNMENT AT TAXPAYERS' EXPENSE. OUR EXPERIENCE TO DATE, HOWEVER, IS THAT VERY FEW OF OUR REQUESTERS MUST BE PLACED IN THE COMMERCIAL CATEGORY, AND, NOTABLY, MOST HAVE ACCEPTED THIS DETERMINATION.

AN ADDITIONAL FACT THAT WE WISH TO MAKE THE SUBCOMMITTEE AWARE OF IS THAT THE CIA FEE COLLECTIONS OVER THE YEARS HAVE BEEN VERY SMALL IN RELATION TO THE VOLUME OF RECORDS DISCLOSED AND, IF EXPRESSED AS A PERCENTAGE OF FOIA PROGRAM OPERATING COSTS, AMOUNT TO ABOUT ONE HALF CENT COLLECTED FOR EVERY DOLLAR EXPENDED. THE NEW FEE PROVISIONS SPECIFIED BY THE REFORM ACT HAVE BEEN INTERPRETED IN ACCORDANCE WITH OFFICE OF MANAGEMENT AND BUDGET AND DEPARTMENT OF JUSTICE GUIDANCE AND ARE NOW SPECIFIED IN OUR REGULATIONS PROMULGATED IN THE CODE OF FEDERAL REGULATIONS AT TITLE 32, PART 1900.

THIS CONCLUDES MY STATEMENT AND I SHALL BE PLEASED TO ANSWER TO THE BEST OF MY ABILITY ANY QUESTIONS THAT MEMBERS OF THE SUBCOMMITTEE MIGHT HAVE AT THIS TIME.

96-846 - 89 - 7

Central Intelligence Agency

Washington, D.C. 20505

16 February 1989

The Honorable Patrick Leahy
Chairman
Subcommittee on Technology and the Law
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of January 5, 1989 to John Wright requesting answers to questions for the record submitted in connection with a hearing held by your Subcommittee last August regarding the Freedom of Information Act. Enclosed you will find answers to those questions.

I hope that the enclosed answers will be helpful to the Subcommittee's inquiry into implementation of the FOIA.

Sincerely,

John L. Helgerson
Director of Congressional Affairs

Enclosure

ANSWERS TO QUESTIONS ENCLOSED IN SENATOR LEAHY'S 5 JANUARY 1989 LETTER TO THE CENTRAL INTELLIGENCE AGENCY

1. "Mr. Tim Peek, editor of the Addison County Independent in Vermont, testified at the hearing about his FOIA requests to CIA about CIA recruiting at Middlebury College and his fee waiver request."

Question: "Was it correct for the CIA to deny Mr. Peek's fee waiver?"

Answer:

At this time, given the benefit of additional information provided during the 2 August 1987 hearing and having had the opportunity to review the file of this particular FOIA request, no, I do not believe that it was correct for CIA to deny Mr. Peek's fee waiver.

As I mentioned in my testimony at the hearing, at the time Mr. Peek's request was received the CIA had had relatively little experience with the new provisions of the FOI Reform Act, specifically with administration of the new fee provisions. Since the hearing, I have reviewed the complete record of Mr. Peek's 29 October 1987 FOIA request, and conclude that the original determination on fee issues involved in Mr. Peek's request appears to have been based upon two factors:

The first factor was a decision that a request for records about CIA's open recruiting and other overt relations with Middlebury College did not meet the standard that a fee waiver or reduction be granted if the disclosure of information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. With the benefit of the additional information provided at the 2 August hearing, our initial decision clearly did not give adequate weight to the keen interest which local subscribers to Mr. Peek's newspaper would have had in records about CIA's open or acknowledged relationships with Middlebury College.

The second factor was a decision that Mr. Peek's request for such records was in the commercial interest of the requester. Mr. Peek made his FOIA request on letterhead of "The Addison Press, Inc." At the time, this information led to a conclusion that The Addison Press was a commercial publishing company. This decision clearly appears to have given inadequate weight to the additional information provided, namely, to the information which described The Addison Press as "Printers-Publishers of the ADDISON INDEPENDENT," to

Mr. Peek's statement that "[t]his material will be used in newspaper articles for general public education ... ," and, to a lesser extent, to his title of "editor." With the benefit of hindsight and the information provided at the 2 August hearing, we have no question at this time that the non-commercial nature of The Addison Press and Mr. Peek's status as a representative of the news media have been firmly established.

In my testimony at the 2 August hearing, I invited Mr. Peek to contact me further about fees associated with his request, and stated that I was prepared to reconsider our previous fee determination. Such contact is a routine procedure used by requesters who have reason to believe that a fee determination has been based on a lack of adequate information or incorrect interpretation of pertinent information. Informal inquiries of this sort from requesters are welcomed, and are weighed on the merits of the information presented. Additionally, CIA's regulations for implementing the FOIA provide for a formal reexamination of initial fee determinations via the administrative fee appeal.

To date, I have not been contacted by Mr. Peek, and again I invite him to write to me to request reconsideration of the fee issues involved in his 29 October 1987 FOIA request.

2. "You testified that the Agency reduced its response time from about 15 months on average in 1985 to about one and one-half months in 1987. You attributed this improvement to the Agency's authorization under the CIA Information Act of 1984 to respond to FOIA requests without searching certain CIA operational files."

Question: "Does any of the improvement come from responding only with previously released documents?"

Answer: There are no data upon which to base an answer to this question. We can advise you, however, that since our computerized data base of previously released documents was initiated in 1980, it has been routinely searched in connection with incoming requests in order to locate documents responsive to those requests. As the size of the data base has increased over the years, it is reasonable to conclude that the number of incoming requests which can be appropriately satisfied by documents in this data base has also increased. Hence, we conclude that some portion, although probably a relatively small portion, of our improved response time can reasonably be attributed to the ready availability of previously released documents. Unquestionably, however, the major factor contributing to improved response time has been the provisions of the CIA Information Act of 1984.

Question: "Does any improvement come from referring requesters to other agencies?"

Answer: Although no data are available, we estimate that the proportion of requests for which referrals to other agencies are appropriate has

remained more or less constant. It has always been the policy of this agency to refer requesters to other agencies when the topics of their requests involve matters or records under the purview of other agencies and outside of the purview of this agency.

Question: "What is the Agency response time for requests that require searching? In other words, what is the Agency's response time when the request is for new materials not previously released and not exempt under the 1984 CIA Information Act?"

Answer: There are no readily available data on which to base an answer to this question. Obtaining these data would require a computer search to identify requests that required search, and then a file-by-file review of such FOIA requests received and of the responses made within any one specific time frame.

Question: "How much new material is the CIA releasing each year compared to previous years?"

Answer: We have no data based on year of release, but we can provide the following data which are based upon the year in which released documents were entered into our computerized data base:

1980:	148 pages	1985:	32,318 pages
1981:	23,907 pages	1986:	22,971 pages
1982:	5,924 pages	1987:	8,880 pages
1983:	23,662 pages	1988:	22,291 pages
1984:	7,064 pages		

Total number of pages entered from 1980-1988: 147,165

3. "Various requesters have advised the Subcommittee that the CIA often uses the so-called 'Glomar' response, neither confirming nor denying the existence of records, while the Defense Intelligence Agency rarely does so."

Question: "Why would this be so?"

Answer: We cannot speak to determinations made by the Defense Intelligence Agency, but only to determinations made by the Central Intelligence Agency. In accordance with the provisions of Section 3.4(f)(1) of Executive Order 12356, the CIA can neither confirm nor deny the fact of the existence or nonexistence of records whenever the fact of the existence or nonexistence of such records is itself classifiable under the Order. Determinations to neither confirm nor deny the fact of the existence or nonexistence of records are also frequently based upon the Director's statutory responsibility and authority to protect intelligence sources and methods from unauthorized disclosure. The applicable statutes are subsection 102(d)(3) of the National Security Act of 1947, as amended, 50 U.S.C. §403(d)(3), and the Central Intelligence Act of 1949, as amended, 50 U.S.C. §403g.

4. "I received a letter from Chuck Babcock, a respected Washington Post reporter, who uses some very strong language to describe the Agency's administration of the FOIA. On one of his requests relating to ITT's involvement in Chile in the early 1970's -- an incident of major public interest -- it took the Agency from 1979 to 1987 to respond and process some 3200 pages."

Question: "How could that request or any request have taken eight and one-half years to process?"

Answer:

The 3200 pages referenced above represent only a portion of the total pages reviewed on behalf of Mr. Babcock and five additional requesters pursuant to their FOIA requests to the Department of Justice (DOJ) for records about ITT.

In increments dating from 7 August 1979 to 18 December 1980, DOJ referred approximately two linear feet of documents for our review and direct response to the requesters. Of this volume, approximately one linear foot (equivalent of 3200 pages) was released in whole or in part. The remaining documents were reviewed, and either referred to other government agencies for direct response or denied in full; the number and page count of the denied documents remains currently and properly classified.

The documents were referred from DOJ in the same form as submitted to DOJ by CIA pursuant to congressional hearings held in the 1970's; most were in redacted form, and many were heavily redacted. During our preliminary review of the referred documents, it became readily apparent that the redacted copies did not lend themselves to equitable FOIA review. Accordingly, further review was delayed by the time required to locate and duplicate as many full text copies of the referred documents as possible.

As our review progressed, information originated by four other government agencies was identified in over 100 CIA documents. Outgoing requests for coordination on these documents began in March 1982, and all incoming responses had been received by January 1986. The coordination responses then required followup review by the responsible CIA component before a final determination could be made. Additionally, over 70 documents were reviewed and referred to five other government agencies for their review and direct response to the requesters.

Following completion of CIA component review, the case was assigned to FOIA officers for compilation of determinations, final review, and response to the six requesters on whose behalf the referrals had been made. A response was sent to Mr. Babcock on 22 October 1987.

5. "In the cases of Mr. Peek, Mr. Babcock, and a number of other requesters, it seems that the CIA has taken upon itself the power to decide what information is of public interest and newsworthy. At the time of Mr. Peek's request, CIA recruiting at Middlebury was a prominent issue, with campus demonstrations and stories in the press."

Question: "Is it appropriate for the CIA to substitute its judgement for that of experienced journalists, scholars and research groups to decide whether released information is of public interest?"

Answer:

It is necessary for CIA officials to make judgments about the public interest value of records sought under FOIA in order to make responsible fee determinations. As set forth in CIA regulations, 32 CFR Part 1900, published pursuant to the provisions of the FOIA, as amended by the Freedom of Information Reform Act of 1986, it is the responsibility of designated CIA officials to make determinations on fee issues, including but not limited to evaluation of the merits of a particular request vis-a-vis "public interest." The Agency considers the merits of each request based upon the information provided by the requester and guidelines issued by the Department of Justice.

Specifically, with respect to the public interest standard, the 2 April 1987 Memorandum issued by the Department of Justice, entitled "New Fee Waiver Policy Guidance," states that "[t]he new fee waiver standard, found at U.S.C. §552(a)(4)(A)(iii), more specifically defines the term 'public interest' and provides:

> "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." [Emphasis added.]

Senator LEAHY. Mr. Roberts, how would you have handled this request from Mr. Peek?

STATEMENT OF RUSSELL M. ROBERTS

Mr. ROBERTS. Senator, I believe we would have simply said—we would have looked at the letterhead. If we had any questions, we would have called the gentleman, resolved any concerns we had, and granted a fee waiver.

Senator LEAHY. Is that what you normally do if you have a question? You just pick up the phone and call the person, or do you go through a lot of correspondence back and forth?

Mr. ROBERTS. We prefer to pick up the phone. We find it cheaper and quicker, sir.

Senator LEAHY. It probably goes a little faster, too.

Mr. ROBERTS. Oh, yes.

[Submissions of Mr. Roberts follow:]

STATEMENT BY

RUSSELL M. ROBERTS

DIRECTOR

FREEDOM OF INFORMATION/PRIVACY ACTS DIVISION

U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

COMMITTEE JUDICIARY

UNITED STATES SENATE

AUGUST 2, 1988

Mr. Chairman and members of the Subcommittee on Technology and The Law, my name is Russell Roberts and I am the Director of the FOIA/Privacy Act Division in the Office of the Assistant Secretary for Public Affairs, Department of Health and Human Services (DHHS). Thank you for the opportunity to testify on behalf of DHHS about our administration of the Freedom of Information Act (FOIA).

Several Members of Congress and others have through the years cited DHHS and its predecessor, the Department of Health, Education, and Welfare (DHEW), as a "model agency" for its administration of the FOIA. My appearance here today as a mere practitioner rather than a policymaker is simply another demonstration of the openness of DHHS and the confidence it places in its FOIA operations.

With your approval, Mr. Chairman, I'd like to refer to our history of faithful efforts to comply with both the letter and the spirit of the FOIA.

When the FOIA was enacted in 1966, DHEW Secretary John W. Gardner asked a task force of attorneys, program managers and public affairs officials to develop recommendations on how best to administer the statute in the Department. Mr. Gardner accepted their recommendation that responsibility for FOIA administration be placed in the Office of Public Affairs. They administer the

FOIA in concert with the General Counsel and with assurance of cooperation by program managers when their records are requested under the FOIA.

Every succeeding Secretary has reaffirmed that decision as well as our long-standing policy of "the fullest responsible disclosure of information consistent with those requirements of administrative necessity and confidentiality which are recognized by the FOIA itself." And nearly every Secretary has taken additional steps to enhance effective implementation of the statute. For example, when Secretary Caspar W. Weinberger published the first major revision and updating of our Regulation implementing the FOIA in 1974 he included a foreward in which he called the FOIA "The public's key to the vast storehouse of government information."

Most recently, Secretary Otis R. Bowen, M. D., has continually focused agency managers' attention on improving administration of the FOIA. In a May 15, 1986 memorandum Dr. Bowen said:

> Not only do I expect full compliance with the FOIA and our Regulation but I want this accomplished in the same cost-effective ways as all our other programs. Last year we expended $7.6 million in responding to 105,687 requests under the Act at an average cost of $65 per request. Part of that cost was in defending ourselves against requesters who sued us for non-compliance with the statutory time-limits. This is unnecessary, time-consuming, costly litigation that in most instances can and should be avoided.

In a second memorandum dated April 21, 1988, Dr. Bowen referred to the 1987 FOIA Report to Congress showing that costs of administering the FOIA were reduced by 3.6 percent to $62 per request in spite of an increase in requests of 4.5 percent to 121,033 from 115,816 in 1986. Referring to those reduced costs Dr. Bowen added:

> This is an accomplishment, of course, but much more must be done. As part of our Regulation implementing the FOIA (45 CFR 5) I have delegated authority to release or deny records and to charge, reduce or waive fees for FOIA services to only 9 Freedom of Information Officers. I hold these FOI Officers responsible for protecting personal privacy, trade secrets, confidential business data, and/or preserving the integrity of our decision-making and investigative processes and personnel policies and practices. They are responsible, too, for collecting fees whenever that is appropriate. FOI Officers must have the requisite knowledge and skills to meet those responsibilities. Full cooperation with our FOI Officers and reliance on their expertise for processing FOI requests will conserve valuable program staff time. There are too many instances of program staff time being spent in reviewing and marking records for deletion. This causes delay and is unnecessarily duplicative. It often results in additional wasteful program effort to reproduce unsanitized copies of the records because FOI Officers cannot agree that the deletions are exempt from FOIA's mandatory disclosure requirements or that other portions of the records are exempt.

The full text of these memorandums is attached, together with examples of memorandums issued by Operating Division Heads in compliance with Secretary Bowen's directive that they issue procedural guidance under their signatures to employees at every level in their organizations as soon as possible.

By limiting authority to release or deny records and charge, reduce or waive fees to only 9 FOI Officers we know what is released and when and we can alert senior managers if there is likely to be controversy or news coverage about disclosures.

Not only do we have FOI Officers with sufficient knowledge, skill and experience to act quickly and precisely in making determinations about records and fees but we have also been able to recruit, train and retain highly competent FOI Specialists. There are approximately 57 FOI Specialists in DHHS and FOI contacts or liaisons in every office. We provide training through the very highly regarded FOIA training programs of the Department of Justice as well as training by the American Society of Access Professionals (ASAP), the U. S. Department of Agriculture's Graduate School and the Office of Personnel Management. Senior FOI Officers continually provide training tailored to the specific needs of DHHS' executive staffs, contract and grants management staff, investigators, personnelists and others including regional office staffs. We and the Department of Defense are the only agencies that have established career ladders for FOI Specialists.

Additionally, we and the Defense Department have long-standing policies intended to make it unnecessary for representatives of

the news media to resort to using the FOIA to compel disclosure of information. In keeping with our policy of "the fullest responsible disclosure" we cooperate with news media representatives covering DHHS in every way possible to avoid the "second story" to the one they set out to get, the story that they had to resort to the FOIA to obtain facts we should have released.

Our policies recognize that requesters sometimes are confused about their rights of access under the FOIA and the Privacy Act. We process every request, whether presented under the FOIA, the Privacy Act or both or neither, under the statute that will provide the greater access. We also require that every response specifically address the issues of release/nonrelease and whether to charge, reduce or waive fees. This insures that we release the maximum amount of information and that we charge only when that is appropriate. As a result of our fee collections last year we collected 17 percent more than a year earlier. Ours is not a "sock-it-to-'em" attitude but is intended to relieve taxpayer subsidy to the extent possible, especially when the requester will benefit financially by the disclosure of information. Approximately 75 percent of our requests are in the category of "commercial use requester."

The 121,000 FOIA requests we processed last year exceeds that of any other Federal agency. Of these we denied in whole or in part

only 1,586 or about 1.3 percent. In the main these were good decisions because only 165 or 10 percent of persons denied access to records appealed those initial determinations to higher authorities within DHHS. Data from our 1986 and 1987 annual reports are attached.

Finally, Mr. Chairman, I believe it very significant that DHHS recently has presented me with the Distinguished Service Award, its highest honor. "Significant", Mr. Chairman, not because it honors me, but because it is one more demonstration of the strong support the Assistant Secretary for Public Affairs, Stephanie Lee-Miller, provides her FOI Officer and the significance Dr. Bowen attaches to effective administration of the FOIA.

Thank you, Mr. Chairman, I will, of course, be pleased to respond to questions.

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAY 15 1986

MEMORANDUM TO : HEADS OF OPERATING DIVISIONS
HEADS OF STAFF DIVISIONS
IMMEDIATE OFFICE OF THE SECRETARY

SUBJECT: Improving Administration of the Freedom of Information Act

The Department is now in the process of seeking public comment on proposed revisions to our Regulation implementing the Freedom of Information Act (FOIA). The intent of the proposed new Regulation, the first major revision in this area since 1974, is to improve administration of the Act within DHHS. It was prepared by staff of the Assistant Secretary for Public Affairs.

I believe it is appropriate in this context to reaffirm this Department's policy which calls for the fullest responsible disclosure of information consistent with those requirements of administrative necessity and confidentiality which are recognized by the FOIA itself. Our proposed new Regulation, therefore, represents a balanced approach to meeting the disclosure requirements of the Act while ensuring the protection of personal privacy, the confidentiality of proprietary business information submitted by persons outside the Department, and the integrity of the decision-making and law enforcement processes.

Not only do I expect full compliance with the requirements of the FOIA and our Regulation but I want this accomolished in the same cost-effective ways as all our other programs. Last year we expended $7.6 million in responding to 105,687 requests under the Act at an average cost of $65 per request. Part of that cost was in defending ourselves against requestors who sued us for non-compliance with statutory time limits. This is unnecessary, time-consuming, costly litigation that in most instances can and should be avoided.

Of even greater importance is the concern of the Justice Department that lack of coordination between FOIA officers and other agency staff is frustrating litigation efforts of the U. S. Government. Justice notes:

> FOIA, of course, is generally available to any person seeking government documents. FOIA requestors often do not identify the parties or the special interests they represent, and almost never indicate whether the requested documents will be used to support ongoing or contemplated litigation against the United States. Compounding the problem, FOIA personnel frequently are not fully aware of the full extent of the governmental interests implicated by a FOIA request. In particular, FOIA personnel often do not know of actual or impending litigation involving the subject matter of the requested documents.

I am sympathetic with the often heavy burden placed upon your staffs when processing FOIA requests in addition to their other duties. However, due to the importance of this issue, I would like you to take the following steps:

1. Require your staffs to inform their designated Freedom of Information Officer whenever the subject matter of a request is also the subject of ongoing or potential litigation.

2. Inform your staffs that only Freedom of Information Officers designated in the Regulation are authorized to release or deny records and charge, waive or reduce fees.

3. Require your staffs to provide requested records to their designated Freedom of Information Officer in a timely fashion, together with identification of their concerns about release.

The Assistant Secretary for Public Affairs is responsible for the administration of the FOIA in this Department. She has my complete support in her efforts to improve administration of the statute and I know she also can count on your assistance.

Otis R. Bowen, M.D.
Secretary

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

APR 21 1988

TO: OPDIV and STAFFDIV Heads

FROM: The Secretary

SUBJECT: Improving Administration of the Freedom of Information Act

The 1987 annual report sent to Congress recently on DHHS' administration of the Freedom of Information Act (FOIA) shows that we now are managing the highest volume of FOIA requests of all Federal agencies in a more cost-effective way than previously.

Total costs of administering the FOIA in 1987 were reduced by 3.6% from $8,491,004 in 1986 to $8,168,965 in 1987. This despite an increase of 4.5% in the number of requests from 115,816 in 1986 to 121,033 in 1987. We collected $961,978 in FOIA fees in 1987, a 17% increase over the $821,868 collected in 1986. And processing costs were reduced from $65 per request in 1986 to $62 per request in 1987.

This is an accomplishment, of course, but much more must be done. As part of our Regulation implementing the FOIA (45 CFR 5) I have delegated authority to release or deny records and to charge, reduce or waive fees for FOIA services to only 9 Freedom of Information Officers. I hold these FOI Officers responsible for protecting personal privacy, trade secrets, confidential business data, and/or preserving the integrity of our decision-making and investigative processes and personnel policies and practices. They are responsible, too, for collecting fees whenever that is appropriate. FOI Officers must have the requisite knowledge and skills to meet those responsibilities. Full cooperation with our FOI Officers and reliance on their expertise for processing FOI requests will conserve valuable program staff time. There are too many instances of program staff time being spent in reviewing and marking records for deletion. This causes delay and is unnecessarily duplicative. It often results in additional wasteful program effort to reproduce unsanitized copies of the records because FOI Officers cannot agree that the deletions are exempt from FOIA's mandatory disclosure requirements or that other portions of the records are exempt.

During 1986-1987 there were at least four (4) law suits in which our failure to meet FOIA's time limits was an issue. This is not acceptable. We must provide FOI Officers with unsanitized FOIA-

requested records quickly to avoid unnecessary, costly and time-consuming litigation resulting from failure to meet the FOIA's time limits of 10-working days for initial determinations and 20-working days for deciding appeals from initial denials. Delays are themselves costly because of the extra effort required to get records from program offices to FOI Officers.

Attached is suggested procedural guidance that I want distributed under your signature to employees at every level in your organization. This should be done as soon as possible.

We are taking other steps, too, to make our administration of the FOIA more cost-effective.

I will write to the Director of OMB, James C. Miller, III, to seek a review of the OMB decision prohibiting collection of fees for packaging and postage costs for mailing records to Commercial Use Requesters, who benefit financially from FOIA requests. The decision cost HHS alone more than $200,000 last year.

Finally, we will include in our final FOIA Regulation authority to require payment of fees before releasing records. This is already included in provisions authorizing FOI Officers to refuse to process FOIA requests for persons in arrears for fees incurred in processing an earlier request. These measures should help reduce delinquency in payment of fees.

Otis R. Bowen, M.D.

Attachment

CY 1986

AGENCY	TOTAL FOIA REQUESTS RECEIVED	TOTAL COSTS INCL. APPEALS	PROCESSING COSTS	COST PER REQUEST	TOTAL FEES COLLECTED
Office of the Secretary 1/	758	$ 288,017	$ 146,177	$193	$ 14,493
Office of Human Development Services	81	7,025	6,796	84	715
Public Health Service					
Assistant Secretary for Health 2/	732	187,420	142,172	194	11,854
Centers for Disease Control	760	183,749	151,595	199	12,377
Food and Drug Administration	44,147	3,681,040	3,644,303	83	376,779
National Institutes of Health	1,382	292,978	282,433	204	27,185
SUBTOTAL	47,021	4,345,187	4,220,503	90	428,195
Social Security Administration	6,912	839,909	662,930	96	15,768
Health Care Financing Administration	61,044	2,732,095	2,662,387	44	362,697
Office of the General Counsel 3/		268,771			
TOTAL	115,816	$8,481,004	$7,698,792	$ 66	$821,868

1/Effective March 20, 1986, Regional FOIA responsibilities were centralized to the Office of the Director, FOIA/Privacy Act Division, Office of the Assistant Secretary for Public Affairs, Office of the Secretary. The transfer of authority preceded abolishment of the position of Regional Public Affairs Director, which held Regional FOIA responsibilities. Also includes Family Support Administration (FSA) which was established on April 1, 1986.

2/Also includes Health Resources and Services Administration and Alcohol, Drug Abuse, and Mental Health Administration

3/Office of the General Counsel attorneys provided legal services to headquarters, program and regional offices on request processing, appeals, FOI litigation, and policy and regulations development at a total annual cost of $268,771.

AGENCY	Initial Decisions Not to Comply Under Sec. 552(a)	Exemptions Used in 552(b) (Number of exemptions may exceed total initial decisions not to comply because more than one exemption may have been invoked.)							Other Statutes							Other Authority		
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	18 USC 1905	21 USC 331j & 21 USC 360j	26 USC 6103	42 USC 242m	42 USC 1320c-15	42 USC 1395bb	Rule 6(e) FRCP	Non-possession of records	Inadequate Identity	Refusal to pay
Office of the Secretary*	292	0	2	5	59	136	89	84							2	14	0	3
Office of Human Development Services	18	0	0	0	12	10	2	0								3	0	0
Public Health Service																		
Assistant Secretary for Health**	48	0	0	0	22	27	15	1								29	6	0
Centers for Disease Control	81	1	0	1	39	24	37	0				1				114	0	0
Food and Drug Administration	581	0	1	0	254	32	11	316	130	249						0	0	0
National Institutes of Health	37	0	0	0	16	24	20	5								79	25	14
SUBTOTAL	747	1	1	1	331	107	83	322	130	249		1				222	31	14
Social Security Administration	432	0	6	76	46	15	307	0			76					168	93	3
Health Care Financing Administration	186	0	55	1	60	45	66	8						1		17	0	0
TOTAL	1,675	1	64	83	508	313	547	414	130	249	76	1	3	1	2	424	124	20

*See TAB A, p.1. Footnote 1/
**See TAB A, p.1. Footnote 2/

AGENCY	Intra-agency appeals Under Subsection (a)(6)				AUTHORITY RELIED UPON FOR TOTAL OR PARTIAL DENIALS ON APPEALS									
					Exemptions Used in 552 (b)(2) (Number of exemptions cited may exceed total appeals because more than one exemption may have been invoked.)							OTHER STATUTES		
	Total Appeals	Granted in full	Denied in full	Denied in part	(1)	(2)	(3)	(4)	(5)	(6)	(7)	26 USC 6103	42 USC 242m(d)	
Office of the Secretary [4]	50	5	36	9	0	1	0	2	33	12	9			
Office of Human Development Services	0													
Public Health Service [5]	58 [6]	17	26	13	0	0	1	16	15	5	11		1	
Social Security Administration	46 [7]	7	26	9	0	4	4	2	8	23	1	4		
Health Care Financing Administration	15	1	11	3	0	1	0	2	5	5	1			
TOTAL	169	30	99	34	0	6	5	22	61	45	22	4	1	

4/The Assistant Secretary for Management and Budget is responsible for appeals decisions for the Office of the Secretary and the 10 Regional Offices. (During an organizational transition--4/1/86 - 12/31/86--ASMB also served as appeals official for the Family Support Administration (FSA).

5/The Assistant Secretary for Health is responsible for appeals decisions for all components of the Public Health Service including: Office of the Assistant Secretary for Health, Centers for Disease Control, Food and Drug Administration, Health Resources and Services Administration, National Institutes of Health, and Alcohol, Drug Abuse, and Mental Health Administration.

6/Includes 2 appeals of non-possession of records.

7/Includes 1 appeal of fee waiver denial; 2 appeals of non-possession of records; and 1 appeal withdrawn.

AGENCY	Number of instances in which it was necessary to seek a 10-day extension		
	Because search involved field facilities or other establishments	Because search involved voluminous amount of records	Because consultation with other agencies or components was required
Office of the Secretary*	0	0	3
Office of Human Development services	4	1	1
Public Health Service			
Assistant Secretary for Health**	0	40	10
Centers for Disease Control	5	10	8
Food and Drug Administration	0	0	0
National Institutes of Health	0	0	0
SUBTOTAL	5	50	18
Social Security Administration	0	1	0
Health Care Financing Administration	14	14	3
TOTAL	23	66	25

*See TAB A, p.1. Footnote 1/
**See TAB A, p.1. Footnote 2/

CY 1987

AGENCY	Intra-agency appeals Under Subsection (a) (6)				AUTHORITY RELIED UPON FOR TOTAL OR PARTIAL DENIALS ON APPEALS Exemptions Used in 552 (b) (2) (Number of exemptions cited may exceed total appeals because more than one exemption may have been invoked.)							OTHER STATUTES		
	Total Appeals	Granted in full	Denied in full	Denied in part	(1)	(2)	(3)	(4)	(5)	(6)	(7)	26 USC 6103	42 USC 1320 c-9	Ethics in Government
Office of the Secretary	42 1/	2	26	12	0	1	1	1	16	14	15		1	
Family Support Administration	1	1	0	0										
Health Care Financing Administration	1	0	0	1	0	0	0	0	1	0	0			
Office of Human Development Services	0													
Public Health Services 2/	47 3/	2	31	11	0	0	1	15	17	8	5			1
Social Security Administration	74	5	57	12	0	3	10	2	3	48	0	10		
TOTAL	165	10	114	36	0	4	12	18	37	70	20	10	1	1

1/ Includes 2 appeals of non-possession of records.
2/ The Assistant Secretary for Health is responsible for appeals decisions for all components of the Public Health Service.
3/ Includes 3 appeals of non-possession of records.

AGENCY	Initial Decisions Not to Comply Under Sec. 552(a)	Exemptions Used in 552(b) (Number of exemptions may exceed total initial decisions not to comply because more than one exemption may have been invoked.) (1)	(2)	(3)	(4)	(5)	(6)	(7)	Other Statutes: 18 USC 1905	21 USC 331j & 21 USC 360j	26 USC 6103	42 USC 242m	42 USC 1320c-9	35 USC 205	Ethics in Gov.	Other Authority: Non-possession of records	Inadequate Identity	Refusal to pay
Office of the Secretary	253 1/	1	1	4	57	109	85	77					4			22	0	0
Health Care Financing Administration	237	0	64	0	58	46	95	3								4	0	0
Public Health Service																		
Assistant Secretary for Health	8	0	0	0	4	3	1	0								13	0	0
Alcohol, Drug Abuse, and Mental Health Administration	9	0	0	0	5	2	4	1								5	0	0
Centers for Disease Control	89	0	0	0	38	19	53	2				1				15	6	0
Food and Drug Administration	443	0	0	0	218	19	8	220	122	142						0	0	0
Health Resources and Services Administration	6	0	0	0	3	3	3	1								6	4	2
National Institutes of Health	38	0	0	2	20	19	17	4						1	1	103	17	9
SUBTOTAL	593	0	0	3	288	65	86	228	122	142		1		1	1	142	27	11
Social Security Administration	503	0	9	98	15	21	375	1			98					303	148	5
TOTAL	1,586	1	74	105	418	241	641	309	122	142	98	1	4	1	1	471	175	16

1/ Includes 7 denials signed by staff of Office of Human Development Services before the function was transferred to the Office of the Secretary.

AGENCY	TOTAL FOIA REQUESTS RECEIVED	TOTAL COSTS INCL. APPEALS	PROCESSING COSTS	COST PER REQUEST	TOTAL FEES COLLECTED
Office of the Secretary 1/	849	$ 253,230	$ 140,700	$166	$ 7,891
Health Care Financing Administration	66,775	2,540,295	2,503,759	38	544,283
Public Health Service					
Assistant Secretary for Health	190	90,604	36,860	194	2,523
Alcohol, Drug Abuse, and Mental Health Administration	212	70,568	68,993	325	7,578
Centers for Disease Control	867	191,217	190,083	219	5,217
Food and Drug Administration	41,500	3,700,552	3,670,901	88	355,706
Health Resources and Services Administration	222	20,648	12,118	55	5,621
National Institutes of Health	1,220	283,977	270,777	222	15,210
SUBTOTAL	44,211	4,357,566	4,249,732	96	391,855
Social Security Administration	9,198	770,743	593,105	64	17,249
Office of the General Counsel 2/		247,131			
TOTAL	121,033	$8,168,965	$7,487,296	$ 62	$961,978

1/ Includes Family Support Administration and Office of Human Development Services.
2/ Office of the General Counsel attorneys provided legal services to headquarters, program and regional offices on request processing, appeals, FOI litigation, and policy and regulations development at a total annual cost of $247,131.

Senator LEAHY. Mr. Faulk, how about you, sir? What would you have done in this case?

STATEMENT OF RICHARD C. FAULK

Mr. FAULK. Well, I am probably somewhere in the middle, Mr. Chairman. We certainly would have tried to contact the individual if we had questions, but unfortunately I think we do most of our contacting by correspondence, which is slower.

[The prepared statement of Mr. Faulk and followup questions and answers follow:]

THE FREEDOM OF INFORMATION ACT

REMARKS OF

RICHARD C. FAULK
DEPUTY ASSISTANT SECRETARY
FOR OPERATIONS

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

(INTRODUCTION)

Good morning. My name is Richard Faulk and I have been the Deputy Assistant Secretary of State for Operations since January 1986. In addition, from October 1, 1987 to July 13, 1988 I served as the Acting Assistant Secretary for Administration. In both capacities, I have been the senior agency official responsible for the implementation of the Freedom of Information Act in the Department of State.

Briefly, I would like to give you an overview of the Department's FOIA program, as well as some insight into our problems and prospects for the future in the hope of paving the way for constructive interaction between requesters, government officials, and lawmakers in order to enable us to comply better with this important mandate.

(BACKGROUND)

Each year the Department receives over 5,000 requests from the public under the Freedom of Information Act, the Privacy Act and other applicable access provisions. In 1987, we completed processing over 4,000 requests which encompassed approximately one million pages of material. As the custodian of records relating to foreign relations and foreign policy, the State Department's records are of immense interest to the public at large. In light of the enormous volume of requests received, the Department developed appropriate institutionalized administrative procedures, as well as a professional staff to meet these demands. It was determined that it would be appropriate to develop a centralized information access program to receive, control, review and respond to the entire gamut of requests under the FOIA, the Privacy Act, Executive Order 12356, the Ethics in Government Act; Congressional oversight; investigations; GAO audits; court orders; and so forth.

The overall objectives of this centralization were to provide uniformity and consistency in decisionmaking, to minimize the threat of accidental or premature release of sensitive national security information, and to relieve the substantive offices of much of their administrative FOIA burden. We believe that we have had considerable success in achieving these objectives.

(MANAGEMENT)

We have recognized the necessity of pursuing an aggressive long range strategy to enable the Department to better manage and to increase control over its workload through the dedication of considerable resources, the implementation of various management initiatives, and the integration of information management policies.

Despite exercising fiscal constraint in other areas, the Department has allocated nearly six million dollars during this fiscal year to the total information access program.

Highlights of our management initiatives include the following:

-- a more streamlined approach to case processing through the utilization of a team approach;

-- the availability (for research and sale) on microfiche in the Public Reading Room of over 1500 significant cases which are of recurring interest to the public;

-- consideration of the feasability of offering this microfiche collection of significant cases to libraries and universities which specialize in foreign affairs;

-- the utilization of the specialized services of the Department of Commerce's National Technical Information Service to respond to certain requests, for example to satisfy demands for computer tapes for munitions export licences; the diversion of such requests to NTIS has resulted in substantial savings to both the Department and the public;
-- the reduction of redundant processing steps and the linkage of like tasks;
-- the recent establishment of a pool of part-time and full-time employees to be held in reserve and to be available to meet fluctuating workload requirements; and
-- the initiation of extensive educational and outreach programs throughout the Department.

Finally, it is important to note that State's information access program was purposely located in the organization which has the lead role in the management of the Department's information. We integrated information access as part of the Department's ongoing information management initiatives and have given full consideration to FOIA requirements in developing and upgrading our information systems.

(REQUESTERS)

Throughout the course of the ongoing evolution of the management of the Department's FOIA program and the refinement of the provisions of the Freedom of Information Act itself, our clientele of requesters has continued to increase in experience and sophistication. While only approximately 25% or our requests are from individuals, the remaining 75% come from attorneys representing clients, the news media, historians, corporations, public interest groups, and other organizations who employ professional researchers. As the result of increased sophistication of these requesters, the complexity and volume of their requests, and proposed FOIA legislation which may limit our ability to protect national security information, last March Deputy Secretary Whitehead wrote letters to fifteen chairmen of Congressional committees and interested Members of Congress to advise them of the Department's concerns in this area.

At this point, I would like to highlight the issues raised in that letter.

(VOLUMINOUS REQUESTS)

One area of grave concern to the Department is the increasing trend for Freedom of Information Act requests which demand the comprehensive production of entire collections of information. During the past year, the Department has received a number of requests using State Department filing designators, TAGS (Traffic Analysis by Geography and Subject), as the descriptions for the material requested. The Department does not believe that such requests are in keeping with the intent of FOIA and the requirement that requests reasonably describe particular documents by subject.

Illustrative of this disturbing trend is a FOIA request submitted to the Department for cables transmitted between the U.S. Embassy in Managua and the Department during the time period of January 1978 through December 1986 bearing the country TAG for Nicaragua in combination with the six specified TAGS for National Security, Emergency Planning and Evacuation, Military Affairs in General, Intelligence, Military Capabilities, and Internal Governmental Affairs. For that nine year period, there are nearly ten thousand telegrams responsive to this description, telegrams which must therefore, be retrieved, reviewed, and processed under the Freedom of Information Act.

A sample of other voluminous requests received include the following:

-- all documents produced in 1987 by the Bureau of Intelligence and Research concerning Nicaragua; and

-- all documents produced, received, or maintained by the Office of Public Diplomacy on Latin America and the Caribbean.

Additionally, we have received requests for information regarding most Department principals including all of their "logs, records, time records, phone logs, appointment books, schedules, calendars, diaries, schedules and correspondence relating to daily meetings, phone calls, conferences, and activities...from...nomination to the present."

Clearly, some degree of reasonableness must be injected into the Freedom of Information process. Sweeping requests of this kind delay processing of less excessive requests, and can impose an extreme drain on the agency and diversion of its resources from its primary mandate. In addition, there are the potential hazards inherent in production of entire collections of sensitive foreign policy information. Breaches of national security become increasingly likely, either through inadvertent disclosures due to human error, which increases exponentially as tremendous volume of documents are produced, or through the "mosaic" effect by which data can be pieced together through providing requesters with an aggregate of information which reveals sensitive information not necessarily discernible from smaller segments of information. Disclosure by the latter means is increasingly likely given the fact that identical requests for information are often sent to several agencies simultaneously.

Furthermore, under current litigation procedures, agencies are required to prepare an itemized index correlating each withheld document, or portion, with a specific FOIA exemption, and the relevant part of the agency's nondisclosure justification. This indexing requirement itself may contribute to the "mosaic," depending upon the degree of specificity required by the court. Again, the comprehensive nature of the information requested accentuates the potential hazard for the "mosaic" disclosure of national security material.

(NATIONAL SECURITY INFORMATION)

There has been an increasing tendency among some requesters to think of the FOIA solely in terms of administrative processes and procedures. Some suggest that many agencies deliberately resist responding to FOIA requests as a further example of bureaucratic foot dragging. It is not always clear whether they appreciate the consequences that inadvertent releases of classified information would have on national security.

We in the foreign affairs community have serious reservations concerning the increasing erosion of our ability to strike the delicate balance between rights of the American public to know the activities of its government and the need for confidentiality in many aspects of the diplomatic process.

(CONCLUSION)

In conclusion, no one at the State Department will argue with the importance that a well-informed citizenry plays in the democratic process. The FOIA exemplifies the value that our government places on this ideal. It is abundantly clear that the interest of the public in foreign affairs and the Congress' commitment to the principles of the FOIA are enduring. I can assure you that the Department is fully committed to carrying-out the statutory mandates of this important legislation. Our challenge is to allocate the scarce resources in order to meet the public's demands under the Freedom of Information Act.

United States Department of State

Washington, D.C. 20520

September 23, 1988

Dear Mr. Chairman:

I would like to thank you for giving me the opportunity to testify on behalf of the Department at the August 2 hearings concerning agencies' compliance with the Freedom of Information Act. The purpose of the letter is to follow up on our exchange, as well as on Assistant Secretary J. Edward Fox's August 5 response to your questionnaire. I am pleased to report that we have taken a number of significant steps to improve our responsiveness to the public and to better implement several provisions of the FOIA addressed in your letter. Highlights of our efforts include the following:

First, at your suggestion, we are attempting to facilitate our interaction with requesters by communicating with them more frequently on the telephone and by revising our form letters to more clearly address issues such as fee waiver criteria and grounds for denial. In that regard, line managers from our FOIA program met with Russell Roberts, Director of the FOIA and Privacy Division at the Department of Health and Human Services. This meeting resulted in a very useful exchange of ideas and philosophy which we will attempt to incorporate into our program.

Second, we have initiated action to acquire and apply advanced technology and office automation to the FOIA program to make our operation more efficient and effective. Additional funding has also been authorized to enhance our existing automated request control system.

Third, in keeping with the Secretary's and my commitment to the Department's implementation of the Freedom of Information Act, we are utilizing a pool of retired senior Foreign Service Officers who have directed their efforts to eliminating backlogs and bottlenecks in several stages of the process including document research and retrieval, correspondence with requesters, processing documents for release, and verification of date in our

The Honorable
Patrick Leahy, Chairman,
Subcommittee on Technology and the Law,
Committee on the Judiciary
United States Senate.

computerized case tracking system. As the result of their work, in conjunction with the ongoing efforts of our permanent staff, during the past six months the Department has completed the processing of over 3,000 cases and has released in whole or in part over 140,000 pages to the public under the FOIA, Privacy Act, and Executive Order 12356.

Fourth, we have incorporated more detailed information regarding expedition and fee waivers as part of our data collection to enable us to better manage our program, as well as to respond to future inquiries.

I hope this information is useful. I look forward to continuing to work with you in the future.

With best wishes,

Sincerely,

Richard C. Faulk
Deputy Assistant Secretary
Office of Operations

United States Department of State

Washington, D.C. 20520

MAR 6 1989

Dear Mr. Chairman:

I am replying to your letter of January 5, addressed to Mr. Richard C. Faulk, concerning the Freedom of Information Act hearings and follow-up questions for the record. Enclosed are answers to the questions posed in that letter. I hope this will be helpful to you and the members of the Subcommittee.

Sincerely,

Janet G. Mullins
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

The Honorable
Patrick Leahy, Chairman,
Subcommittee on Technology and the Law,
Committee on the Judiciary,
United States Senate.

FOIA OVERSIGHT HEARING, August 2, 1988,

BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON TECHNOLOGY AND THE LAW. RESPONSES TO QUESTIONS BY SENATOR PATRICK LEAHY FOR THE HEARING RECORD FROM:

RICHARD C. FAULK, DEPUTY ASSISTANT SECRETARY FOR OPERATIONS, STATE DEPARTMENT

Q1. The State Department collected more fees from processing FOIA requests than any other agency in 1987. How much time does the State Department spend on fee determinations rather than actual search, retrieval and review of documents?

A1. The State Department takes a serious and responsible attitude toward the implementation of the FOIA in general, and the administration of the fee provisions in particular. Every effort is made at the initial stage of the fee determination process to make a decision that is fair and equitable to the requester and that recovers costs as intended under the reform legislation and the OMB guidance. A minimal amount of effort relative to the total process is spent on making fee determinations: the combined total effort for all individuals involved in the fee process is less than one (1) year, while over 100 effort years are devoted to the actual search, retrieval, review, and processing of requests.

Q2. Mr. Frank Machak testified that the State Department spends "much more" time on fee determinations now than it did before the 1986 amendments became effective. Would it be more cost effective, given the backlog of FOIA requests at the State Department, to spend more time evaluating the merits of the request and less time on fee determinations?

A2. The response to question 1 also applies to this question. In addition, it should be noted that no time is spent in "evaluating the merits of the request"; the only determination other than that pertaining to fees made at the initial stage pertains to the fulfillment of the Act's reasonable description requirement.

Q3. Mr. John Wright, Information and Privacy Coordinator for the CIA, testified that most of the requests the CIA receives under the FOIA are sufficiently well defined and focused that the agency is able to process them for free, because they fall within the 100 free pages of releasable material and 2 hours of free search time. What percentage of State Department FOIA requesters are not charged fees because their requests fall within these provisions?

A3. Unfortunately, FOIA requests directed to the State Department are not "sufficiently well defined and focused" as those received by the CIA. Generally, it is not possible for the initial processing and acknowledgment staff to discern which requests could be processed for free because they fall within the 100 free pages of releasable material and 2 hours of free search time. As a matter of fact for requests completed last year, over 320,000 pages of material were retrieved, at an average of approximately 241 pages per case. An illustrative example of the volume and complexity of the Department's FOIA requests is that of twenty-six requests received from a single requester in response to which over 30,000 pages of information were retrieved. Finally, of those FOIA requests closed in 1988, approximately $8100 in fees were collected for 85 requests, or 3% of the cases closed.

Q4. You testified about a number of management initiatives to streamline processing of FOIA requests and the Subcommittee has received your letter outlining additional steps the State Department has taken. Has the Department gone forward with the plan to offer a microfiche collection of significant cases to libraries and universities specializing in foreign affairs?

A4. The Department is continuing to add to the microfiche collection of significant cases maintained in the public Reading Room; however, since there is not a detailed index, the collection has not yet been offered to libraries and universities specializing in foreign affairs. As the result of consultations with historians, NARA, and other interested parties, we have been exploring the utilization of a microfiche

product which would be topically and geographically indexed, thereby making it more usable for research purposes.

Q5. You also testified that the Department has established a pool of part-time and full-time employees to be held in reserve. What does a FOIA reservist do at the State Department? How may full-time reservists are there? How many part-time? How does this pool help with the FOIA processing problems at the State Department? Is not the problem at the State Department that people do not stay in the FOIA office? How will a reserve pool establish the experience necessary to improve FOIA operations?

A5. I would like to clarify my testimony regarding the "establishment of a pool of part-time and full-time employees to be held in reserve (emphasis added) and to be available to meet fluctuating workload requirements." As you are aware, a precondition to employment at the State Department is a security clearance; for those employed in the FOIA program, a Top Secret clearance in required. Qualified individuals from outside the agency whom we would like to bring into the FOIA program must, therefore, undergo a full field investigation, which may take as long as a year to process. In order to cope with the considerable time lag between vacancy, hire, and actual employment, we are attempting to stay a step ahead by actively recruiting qualified candidates and initiating the security clearance process in anticipation of actual vacancies. At the time a vacancy occurs, there is a pool of cleared, qualified candidates whom we can draw upon for immediate employment. These individuals then are hired at the entry level to become a part of our continuing effort to develop a corps of professionals in the specialties of information research and information access. We hope to reduce the turnover rate through building on the established career ladder to enable these information professionals to rise to management levels within the Department's information management activities. I trust that the foregoing clarifies

this personnel initiative and regret any misunderstanding that there is a category of "FOIA reservists" at the State Department.

We are pleased to report the various ways in which we have implemented this process since my testimony last August:

First, we have allocated fifteen new part-time positions to the FOIA program; fourteen of these positions are currently filled.

Second, the Office of Personnel has established Schedule B hiring authority for the FOIA program. As the result of an advertisement of the positions, we have tentatively identified 52 qualified candidates.

Finally, 37 potential candidates were identified through the Department's Job Fair last December.

In sum, fourteen new employees have been hired and a total of 89 candidates are being screened for the reserve pool to be drawn upon in the event of vacancies or the allocation of additional positions.

Q6. Some requesters have complained that the problem at the State Department is not so much the review process, but the clerical process -- for example, that the staff vacancy rate is excessive, and that documents cleared for release take months or even years to be sent out to requesters. How is the Department dealing with these problems?

A6. We are pleased to report that the State Department has made significant inroads during the past year in reducing the backlog of pending cases. Our current backlog (as of January 31) is 3655, in contrast with a backlog of 5457 for the same time last year. Our efforts to deal with the vacancy rate are addressed in the previous question.

Although it may appear that an excessive amount of time may pass between review completion and release, it may be explained in part by the Department's adherence to a first-in, first-out queue system at each phase of the process. The

consequence of this queuing is that cases are processed for release based upon their date of receipt by the Department, not by their date of return from the reviewing office.

Furthermore, it is true that the processing time (primarily not clerical) required to close a case is -- and must continue to be because of the nature and sensitivity of information maintained by the Department -- extremely labor intensive. Prior to release, each package is given an intensive line-by-line re-review to guard against the inadvertent release of national security information, to ensure the appropriate invoking of exemptions, to guarantee consistency in review determinations, etc., and transmitted to the requester with a cover letter which describes the actual processing of the case and the status of the remaining actions. These steps are, of course, performed in addition to the clerical functions of actual excising and copying. It should be noted that the excision process, and the review thereof, is particularly time-consuming because State Department reviewers take seriously the reasonably segregable criteria and, therefore, frequently do not deny entire passages, but rather individual words or phrases.

Q7. You testified that breaches of national security become more likely when large collections of documents are requested. Is it not more likely that, by processing requests in large groupings, the reviewing officers will have the benefit of the full context of the material and will be able to determine more clearly the national security interests at stake?

A7. While your observation may apply to the review process, it does not hold true for the administrative aspects of processing large collections of document due to the extremely tedious nature of this activity.

Q8. Mr. Machak submitted a comment to OMB last year on its proposed fee regulations that he believed book authors are "commercial" users of the FOIA, because, presumably, they receive royalties from their work. Is this the policy of the State Department? If so, please explain why.

A8. No. The Department has not implemented any policy which would categorize all book authors as "commercial" requesters. Each request is evaluated on a case-by-case basis in accordance with our published fee regulations.

Q9. We discussed at the hearing the form letter the State Department sends to FOIA requesters to inquire about their credentials and intent. The 1986 amendments to the FOIA regarding standards for fee waivers were intended to be liberally construed in favor of waivers for noncommercial requesters. The changes were meant specifically to repudiate the unduly restrictive approach to fee waivers provided by the Justice Department to agency heads in a 1983 Fee Waiver Policy Guidance memorandum by Assistant Attorney General Jonathan C. Rose (the "Rose Memorandum"). Has the State Department continued to incorporate the restrictive philosophy of the Rose Memorandum into the Department FOIA fee waiver determinations since the 1986 amendments went into effect? What have you done to ensure that the "Rose Memorandum" is no longer used by Department personnel in making fee waiver determinations?

A9. Since the enactment of the 1986 amendments to the FOIA, the Department has revised its fee regulations, as well as the associated forms and letters used by the FOIA staff. Employees responsible for fee determinations rely principally on the OMB guidelines and our own published regulations.

Q10. You supplied Representative Glenn English with information on fee waiver denials after appeals. I find the pattern of justification for the denials disturbing. From January 1, 1988 through June 26, 1988, the State Department denied four appeals from denials of fee waivers, all on the ground that the requested information would not "contribute significantly to public understanding of the operations or activities of government." The requests were from scholars, researchers and authors, who all indicated their intentions to publish or otherwise disseminate their work to the public. Is it appropriate for the State Department to substitute its judgment for that of such requesters to decide whether released information is of public interest?

A10. The Department's decision not to waive fees on the grounds that the requested information would not "contribute significantly to public understanding of the operations or activities of government" is not based on the subjective judgment of whether the information is of public interest.

We are primarily guided by the provisions of our regulations pertaining to the factors of the subject of the request; i.e., subject of the request, informative value of the information to be disclosed, contribution to an understanding of the subject by the general public, and significance of the contribution to public understanding.

Senator LEAHY. I will be back in just a couple of minutes. Again, we have another vote and I am going to go to that and then I will be right back.

[Recess.]

Senator LEAHY. Gentlemen, I want to thank you for your forbearance on this, and I apologize for the votes we have had to leave for.

Mr. Faulk, in your testimony you refer to the enormous volume of requests that are received by the State Department. Now, that totals about 5,000. The Food and Drug Administration—that is an agency with a total budget of about one-tenth of the Department of State—receives around 44,000 requests a year and they seem to have a lot less trouble dealing with them.

I know these are the kinds of questions you are eager to have asked. How would you explain that?

Mr. FAULK. Well, I think, Senator, you have to look at the complexity of the inquiries that we get at the State Department. I think most of your colleagues up here and you well know, foreign affairs is not a very direct business; it is very complex, and so the inquiries we get are just as complex as the business we are in.

As a result, they take an awful ~~long time~~ to review, to go over the information, and get it back to the inquirer.

Senator LEAHY. Well, yes, but your backlog is growing by several hundred cases every year. Do you see an ominous trend? I mean, in all seriousness, FOIA can become a dinosaur or it can be what it is supposed to be, a tool to keep not only the American public informed, but those of us in government doing what we are supposed to do and having to acknowledge it if we don't. But yet it can die of its own weight.

Mr. FAULK. I agree with you, Senator, and so does the Secretary of State. Two years ago, he made it quite plain to all of the assistant secretaries in the Department that he was 100 percent behind FOIA and that we were to find the resources and the people to do the job in a timely fashion.

We have been trying to do that. We have increased the FOIA staff; we have put a lot more time and effort in automating the process, and we have gotten our backlog down. Unfortunately, it is not down to a number that either you or I can live with right now, but we do believe that we are moving in the right direction. Automation is helping us tremendously in this field.

Unfortunately, some of the trends that we have been seeing are coming in with these massive increases of compiled information.

For instance, in my testimony I give an example that we have one inquiry asking for all the telegraphic traffic by our TAGS, which is our filing indicators, for Managua and the Department from the years 1978 to 1986.

That is over 10,000 telegrams that have to be retrieved, reviewed, and worked on. That is, for us, an enormous undertaking, and——

Senator LEAHY. How many of those telegrams would be classified, just in your normal experience?

Mr. FAULK. Well, our records show that about 50 percent of the inquiries coming in are classified, totally. In this case, because of the TAGS that were requested, I would say somewhere close to 80 or 90 percent are probably classified.

Senator LEAHY. Now, that was 1978 to——

Mr. FAULK. 1986.

Senator LEAHY [continuing]. 1986. Now, that is——

Mr. FAULK. A 9-year period, sir.

Senator LEAHY [continuing]. A very important period. Somoza fell, the Sandinistas came to power. From an historian's point of view, if we are to have a true history of that period, this is one of the best ways to get it, rather than speculate on it, would it not be?

I mean, we could argue both sides, but can't they make the argument that if they use your designators, it is the most objective way of getting the history?

Mr. FAULK. Well, it is the best way we can retrieve it, also, so there are both sides to the coin. It is the all-inclusiveness that bothers us. The act itself says you should have a specific inquiry on a specific subject, and that is what we look for and that is not what is being given to us in these all-comprehensive retrieval requests.

Senator LEAHY. But on that one, can't you sit down and work it out with the requestor to break it into a manageable size? I am assuming that your concern is the size of it, not the issue, am I correct?

Mr. FAULK. That is it exactly.

Senator LEAHY. Yet you know that there is always going to be a great deal of interest in this period in Central America, both from those who have supported the administration's positions down there and those who have opposed those positions. So a lot of this stuff, you are going to have to dig out at some time or another anyway. I mean, if it is not this requestor, it is going to be somebody else. It is going to be a news organization or it is going to be an historian, or whatever.

Isn't it also to your advantage, though, to sit down and break it into manageable parts, or is this being oversimplistic?

Mr. FAULK. It is, but, again, as Mr. Markman pointed out to you earlier, I think it is taking resources and putting them into one requestor's request and working that request through. What happens is other requests get backlogged and, you know, we just can't compete.

So the individual who has got one request or has, you know, a reasonable request falls further back in the queue.

Senator LEAHY. Well, let me ask——

Mr. FAULK. We believe there is some reasonableness in the way to go about this, and that is what we are trying to work out with the inquirers on this.

Senator LEAHY. In preparing for this hearing, I was struck by something that I had seen in the question of procurement in the Pentagon. The area of procurement is extremely important to all of us not only to get our money's worth, but also to make sure that the weapons systems that we buy actually do work, and we know many of them do not.

But moving to procurement is not a very good career move oftentimes for somebody in the military who wants to end up with stars on his or her shoulders, and certainly I think that is a very valid desire. But they are not going to want to get shunted off into procurement.

Now, Mr. Roberts, in your testimony you say the Departments of Defense and Health and Human Services have career ladders for FOIA personnel. Am I correct in that?

Mr. ROBERTS. That is correct, Senator.

Senator LEAHY. But, Mr. Faulk, that is not the case in the Department of State. One does not make his mark as a member of the Department of State by being involved in a career in FOIA, is that correct?

Mr. FAULK. Well, we have no Foreign Service assigned directly to FOIA. We do have them in our classification/declassification unit, which is——

Senator LEAHY. A Foreign Service officer would probably shudder and lie awake nights if he or she thought they were going to be assigned to FOIA. I mean, let us be very frank. Is that correct?

Mr. FAULK. Absolutely, but we do have a cadre of very experienced, very dedicated, loyal civil servants who do make a career out of it and do a very good job, and they reach the levels of GS–15.

Senator LEAHY. So do you feel that there is enough of an initiative to get good people to stay there and to improve, streamline, and make the FOIA system work?

Mr. FAULK. I have been attempting to do that, Senator, since I have taken over the job that I currently have in 1986. The Department of State has gone to OPM and has been able to get schedule B authority to hire college graduates to work as information techs, to work as paralegals in this field. We hope to be bringing in our first tranche this September and October.

We do have a problem in hiring. As you know, everybody who works in the Department of State has to have a full field background. It takes a long time to get that, and so we do miss some of the hiring opportunities that other agencies have.

Given the background and the information that people deal with, they have to have a good clearance, and high-level clearances take time. But we are working on trying to improve the working area of our people, and also their grade levels, and bring in more people.

Senator LEAHY. Mr. Wright, what about over at the CIA? Is this considered almost—well, in an open session I am not going to mention a couple of the assignments that are considered one step short of Alcatraz.

But going into the FOIA part of the CIA probably would not be the most sought-after area for a career CIA officer, would it?

Mr. WRIGHT. Senator Leahy, actually, some of the FOIA positions are highly coveted. We do have a career track in records management activities and an assignment in the FOIA office would be con-

sidered an important tour of duty for an individual on that career track.

As far as the review of records for releasability is concerned, the CIA operates on the basis of using its most senior intelligence officers to conduct those reviews. So outside of the main work force cadre, you do find a very substantial number of intelligence officers, both operations officers and intelligence analysts, and what have you, involved in the review of records to determine their ultimate releasability.

Senator LEAHY. So then if somebody gets well trained into handling FOIA, they actually do have a career available to them there. They would not be in a position where they would almost immediately be looking for somewhere else to go?

Mr. WRIGHT. Yes, sir, that is correct. It would be in, overall, our records management field.

Senator LEAHY. Now, Mr. Faulk, in regard to the fee issues, I looked at the form letter that the Department sends to requestors to inquire as to their credentials and intent. It seems like there is an awful lot of paperwork here.

Most of the initial request letters I have seen have a lot of information, such as a university letterhead or a listing of publications which would help people make waiver determinations.

Are you able to categorize how much time is spent on fee determination as compared to actual search and retrieval and review of documents?

Mr. FAULK. If you don't mind, Senator, I will turn to my expert on that and ask the question.

Senator LEAHY. We will get the fee determination expert here.

Mr. FAULK. I would like to introduce——

Senator LEAHY. How much time is spent on what we are going to charge them and how much time is spent on what we are going to give them?

Mr. MACHAK. Yes, Mr. Chairman. By the way, I am Frank Machak, the Department's information and privacy coordinator.

In all candidness, sir, much more since the 1986 amendments. The initial processing steps that we now follow actually include the presence of an attorney periodically during the week as we review the requests in order that we can make the most reasonable judgment that we can.

I would say we are spending approximately 1½ persons a day just reviewing the incoming requests. That would be a professional staff member, a paralegal, with the help of an attorney, to clarify the issue of fees as well as reasonable description.

Senator LEAHY. One of the reasons I asked is that we have a copy of a letter that the American Library Association sent to Mr. Whitehead, in which the ALA took issue with the treatment by the Department of State of the National Security Archive, which is an ALA member, on the fee waiver issue.

[Letter referred to above follows:]

WASHINGTON OFFICE

AMERICAN LIBRARY ASSOCIATION

110 MARYLAND AVENUE N.E. • WASHINGTON, D.C. 20002 • (202) 547-4440

July 27, 1988

The Honorable John C. Whitehead
Deputy Secretary of State
Department of State
2201 C Street, N. W.
Washington, D. C. 20520

Dear Mr. Whitehead:

I have recently reviewed the July 7 letter from your Information Access Branch to one of the American Library Association member libraries, the National Security Archive. The letter denies the Archive any waiver of fees under the Freedom of Information Act on grounds that explicitly denigrate the function of libraries in our democratic society.

On page six, the letter states that "Merely making records available to those who may request them (much the same type of dissemination that government agencies provide through the FOIA) will not itself contribute significantly to the public's understanding of the operations of government." The letter goes on to cite this argument as the basis for denying any waiver of fees.

I should note the internal contradiction in the letter's logic. The letter argues that when the Archive publishes documents received under the Freedom of Information Act, such action would be considered by the Department to be "commercial" in nature (and therefore not deserving of fee waivers). Yet "merely" making the documents available at the Archive seems in the Department's view not to disseminate them widely enough to meet the criteria of contributing significantly to public understanding.

I want to focus on this latter point, since it indicates a serious misunderstanding of the vital role libraries play in making information widely available to the public, and would seem to preclude any library from gaining waivers of fees from the State Department under the Freedom of Information Act. In the modern information age of electronic databases, computerized reference services, desk-top and multi-media publishing, and an ever-increasing flow of books and other printed materials, libraries do not simply serve as passive repositories of information, but as active acquirers and disseminators of information. The highly trained professionals who staff our nation's libraries fulfill the public's right-to-know not only by servicing requests for information as they come in, but also by anticipating those requests and pulling together materials from a wide variety of sources, including the Freedom of Information Act. Librarians act on behalf of all users by gathering information and creating collections for the public at large and for specialized audiences. Along with the electronic and print media, libraries provide our society's most important and efficient avenues for information dissemination.

The legislative history of the FOIA amendment to the Anti-Drug Abuse Act of 1986 (PL 99-570) makes clear the intent of the amendment. The intent was to qualify for fee waivers and reductions, all requesters who are engaged in the dissemination of information to the public where the information contributes to public understanding of the government and its policies, and where disclosure is not primarily in the commercial interest of the requester. Perhaps, the Department overlooked the colloquy between Senators Kerry and Leahy on page S16496 of the October 15, 1986, Congressional Record when it wrote that the legislative history is contradictory. The following language from Senator Leahy could hardly be more clear:

> ...Any statements in the record which give a more restrictive meaning to the amendment with regards to the waiver and reduction of fees conflict with the clear language of the amendment itself. With this amendment, we have sought to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA to the news media and public interest users of the FOIA. Information released under the FOIA which contributes to public understanding of the Government clearly qualifies for waiver or reduction of fees, as long as it is not primarily in the commercial interest of the requester. Where disclosure is primarily in the commercial interest of the requester, and the records are requested for a commercial use, the requester will pay search, duplication and review charges under this amendment. FOIA requesters engaged in the dissemination of information to the public--and that of course is the primary function of libraries and repositories of public documents--would qualify for waiver or reduction of fees under the FOIA.

Furthermore, it is inappropriate to refer to the President's signing statement as part of the legislative history, since it would upset the balance of powers. It is for Congress to interpret its intent as it enacts legislation.

The American Library Association, a nonprofit educational organization of 45,000 librarians, educators, trustees and other friends of libraries, is dedicated to the improvement of libraries and information services for all people. The Association supports freedom of public access to information generated by the federal government, a right recognized in the Freedom of Information Act of 1966. We believe that an informed citizenry is the very foundation of democracy, and the Constitution guarantees the free communication of ideas and information in every form through all media. The Freedom of Information Act was born out of the belief that the government and the information generated or procured by the government belong to the people. The concept of "the people's right to know" is fundamental to a democratic government.

Perhaps, the Department's slighting of the role of libraries derives from its false distinction between an educational institution and "a repository of documents or a library." The Department's FOIA regulations seem to restrict the former term solely to schools operating programs of scholarly research. I would submit that just as much scholarly research has been facilitated by the New York Public Library as at most of the colleges and universities in this

country; yet, the Department's definition ignores the very real educational purposes served by the New York Public Library and other public and special libraries. I would suggest that the Department's regulations incorporate the concept of "educational" as defined in Webster's New Twentieth Century Dictionary of the English Language (2nd. ed., 1968) as "educating; giving instruction or information."

It troubles me greatly that the Department of State would so systematically mischaracterize the essential role of libraries in keeping the public informed. The July 7 letter implies that libraries are not "direct disseminators" of information to the public. The letter suggests that while certain users of documents in a library might qualify for fee waivers, the library itself could not qualify because the Department has no way of determining what that ultimate use would be. Taken to its logical extreme, this line of argument would have librarians invade the privacy of our users, note their names and credentials, inquire as to their intended use of materials, and report back to the government in order to justify waivers of fees. However, librarians would have to pay fees first, obtain the documents, interview all the users, and then seek a refund of fee payments. This would be absurd, not to mention putting librarians in an unethical and illegal posture toward library patrons.

Any library's publicly accessible holdings of government documents or other government-related records by their very existence in that library contribute significantly to public understanding of the operations or activities of government. This principle underlies the Depository Library System, a nationwide resource of 1400 congressionally designated libraries which provides access to the wealth of research, knowledge and information produced by all branches of the federal government.

Information is the currency of democracy, and our democratic system continues to rely on the essential--and direct--role that libraries play in informing the public. The Department should cease to make the distinctions stated in the July 7 letter between providing access to and disseminating of information. A library open to the public clearly provides for access to and dissemination of information.

Since the July 7 letter noted that the Archive has the right to appeal the Department's determination, I assume that there still is time for the Department to alter its determination and acknowledge the significant--indeed, vital--contribution to public understanding of government that libraries such as the Archive make on a daily basis. I look forward to your positive response to such an appeal, and I appreciate your consideration of these strongly held principles of the American Library Association.

Sincerely,

/s/

Eileen D. Cooke
Director
ALA Washington Office

EDC:tj

The ALA says that the State Department's determination that the Archive doesn't qualify for fee waivers and is a commercial requestor, to boot, "explicitly denigrates the function of libraries in our democratic society."

I sort of think of a library as a place you go for public access. Why wouldn't libraries get waivers from fees automatically?

Mr. MACHAK. Well, again, sir, just for the record, we have made that decision with respect to the organization you identified. I have not seen the letter, by the way, to Deputy Secretary Whitehead.

But if I could make a general comment on libraries, we are more concerned, again, with the private libraries. We are concerned about this issue of what I will characterize as passive dissemination; that is to say, just to collect information and put it somewhere without some better defined dissemination.

We are also concerned, Mr. Chairman, with those organizations which we understand intend to resell government documents. Finally, sir, of course, the group for which we have made this decision, we have obviously indicated their right to appeal to us and to provide us more information that could perhaps persuade us in these areas.

Senator LEAHY. Well, let us take the New York City Public Library, for example. They get information on a particular thing. They have a plan that if people need it, they are going to charge them for copying roughly equivalent to their costs.

You don't consider that reselling, though?

Mr. MACHAK. No.

Senator LEAHY. OK. Mr. Roberts, I noticed in your annual FOIA report that you have collected more fees for processing FOIA requests than any other agency. But I have got a stack of complaints about this high of people complaining about fees, but I don't think I have seen any from HHS.

You collect more and we don't get a heck of a lot of complaints. Why is that? This gives you a chance to give a self-serving answer.

Mr. ROBERTS. Thank you, Senator. I was hoping for just such an opportunity. [Laughter.]

I think part of the answer is that our FOIA officers and FOIA specialists are absolutely expert at what they do. They are highly trained, they are very competent.

Our procedures are intended to break down bureaucratic barriers and get on with the issues raised by any Freedom of Information Act request. First, we are going to classify that requestor into either of the three categories on the basis of the information we have in hand.

If we don't think that that is sufficient information, then we will get it as expeditiously as possible.

We determine what we are going to do about fees and if we are going to collect them, then we notify the requestor if the fees would be in excess of $250. Otherwise, we simply begin processing. If we are going to waive fees, that decision is made immediately.

The second issue raised by any request is to what extent are we going to comply. We don't consult with attorneys to get to the answer, the resolution of either of those issues, Senator. We don't consult with attorneys before making the initial decision on what we are going to do, and we simply do it.

If there is an appeal from that, then our rules require that we consult with attorneys. We just don't feel the need. Our attorneys have a very heavy workload. Initially, years ago, we consulted them in every instance, and as we became expert we simply decided we could relieve some of the burden on them by biting the bullet and making our own decisions, and we do that, sir.

Senator LEAHY. But in defense of Mr. Wright and Mr. Faulk, Mr. Wright represents an agency which by its very nature deals heavily, in some instances exclusively, in classified documents, not just the normal classification, but straight up through code word documents.

Mr. Faulk with the State Department also has a great deal of classified material going back and forth.

Can they look at an example from HHS and really apply some of the steps that you have taken into CIA or State?

Mr. ROBERTS. I think any agency can expedite processing of requests by use of the telephone, by hand-carrying, by use of telefax machines, by other means.

Senator LEAHY. Do you handle classified material?

Mr. ROBERTS. Yes, sir.

Senator LEAHY. Of what nature?

Mr. ROBERTS. Referral, usually, from CIA, FBI, Defense Department, State Department, National Security Agency, when a request to them involves records that were generated by our department.

Senator LEAHY. Trade secrets?

Mr. ROBERTS. No, sir. Trade secrets—of course, we have a very heavy volume of commercial use requestors.

Senator LEAHY. But those are items that you have to withhold under certain aspects of the law. I mean, there are certain types of trade secret material that you do withhold, do you not?

Mr. ROBERTS. That is correct.

Senator LEAHY. You make that determination and then withhold it?

Mr. ROBERTS. That is correct. Prior to the Executive Order 12-600 on treatment of business data and response to FOIA requests, we have for years done exactly that. Maybe the practice enables us to do it quicker.

Senator LEAHY. Well, Mr. Wright, Mr. Faulk, and Mr. Roberts, I will just say to all of you, as I have said to the Justice Department, you know, this committee really does want to work with you on FOIA issues, and we have. We have written exemptions on classified material. We have worked on organized crime issues and other areas.

I don't mean to understate the difficulty when massive requests come in or requests that touch on various aspects of classified information, but I will just leave you with this thought that it has been very, very much the case with FOIA that we want the presumption on openness, not on closed government.

We know that reporters with deadlines don't have time to appeal wrongful fee determinations for weeks on end. We also know that for a lot of requestors, if agencies drag their heels on requests or give a blacked-out piece of paper, then the delay itself becomes a denial.

If access to government files is denied when there is really no legitimate national security reason to do so, then we become more of a closed government. We have enormous advantages as an open government; we have certain disadvantages because of that.

With FOIA, mistakes will be made and periodically some things will go out that probably shouldn't have, but I think on balance we are far, far better being able to point to this kind of openness.

It gets cumbersome. We lurch along sometimes as a result of it, but I think we are better as a country. I think we are more public in our mistakes than other countries are, but we usually benefit more from them.

I thank you gentlemen for being here. If it is any consolation to you, if I had to have your job making some of these determinations, I would probably have even less hair than I do have. But I would also suggest that all of the agencies—and a lot of others could be here—may want to drop by HHS and just see what determination is made to make it work well, the telephone calls, the telefax machines, and all. Sometimes it can help things along.

Thank you.

[Whereupon, at 1:03 p.m., the subcommittee was adjourned.]

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